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## **The Quest for Justice: Joseph Kony and the Lord's Resistance Army**

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## ARTICLE

### THE QUEST FOR JUSTICE: JOSEPH KONY & THE LORD’S RESISTANCE ARMY

*Christopher E. Bailey<sup>1</sup>*

I. A CALL FOR ACCOUNTABILITY .....	248
II. THE UGANDA-LRA CONFLICT .....	251
A. A Short History of the Conflict .....	251
B. The Nature of the Criminal Offenses.....	252
C. Ugandan Initiatives against the LRA.....	255
d. Whither a Transnational Armed Conflict? .....	260
III. CHARACTERIZING THE CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW .....	261
A. Introduction .....	261
B. The Nature of the Conflict .....	264
C. The Combatant Status of LRA Members .....	270
D. Assessment: The Scope of Combatant’s Privilege .....	275
IV. ACCOUNTABILITY UNDER UGANDAN LAW .....	275
A. Introduction: Modernizing Ugandan Law and Practice.....	275
B. The Administration of Justice: Courts, Statutes, & Issues .....	276
C. Notable National Security Cases: Steps & Missteps .....	291
D. Traditional Acholi Reconciliation Practices: Necessary but Not Sufficient.....	302
E. Assessment: Willing, But Unable without Support .....	304

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V. ACCOUNTABILITY UNDER INTERNATIONAL	
CRIMINAL LAW .....	306
A. Introduction: Addressing the Scope of the Conflict .....	306
B. The Rome Statute and the International Criminal Court .....	309
C. Alternative International Approaches in Constituting an	
ICC Proceeding .....	316
D. A Recommended Way Forward: Closing an Impunity	
Gap .....	322
VI. CONCLUDING COMMENTS .....	327

### *I. A CALL FOR ACCOUNTABILITY*

Joseph Kony has earned the dubious moniker of the worst human rights offender in Africa. The Lord's Resistance Army ("LRA"), led by Chairman Kony, waged a 28-year campaign of terror ranging over a large swath of Central Africa and has led to the death, injury and displacement of millions of people in northern Uganda, southern Sudan, the Democratic Republic of the Congo ("DRC"), and the Central African Republic ("CAR").<sup>2</sup> Although Kony initially mounted a traditional rebellion against the central government in Kampala, imposing a high cost on the Acholi region of northern Uganda, his later attacks used terror tactics often launched from sanctuary in either southern Sudan or the DRC.<sup>3</sup> In fact, Kony's later

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2. The LRA originated in the ethnic Acholi districts of northern Uganda in the late 1980s. Initially, after the 1986 fall of Milton Obote's government in Kampala, Alice Lakwena's Holy Spirit Movement and its military wing the Holy Spirit Mobile Force ("HSMF") emerged as an opposition group purporting to represent Acholi interests. Her organization fell apart in 1987-88 and her nephew, Joseph Kony, eventually formed the LRA with remnants of the HSMF. The *LRA Crisis Tracker*, managed by Invisible Children and Resolve, both non-profit organizations dedicated to increasing awareness about the LRA conflict, provide a useful resource for assessing Kony's recent terror campaign. LRA CRISIS TRACKER, available at <http://www.lracrisistracker.com/> (last visited Jan. 14, 2015).

3. Initially, the LRA could have been characterized as a rebel/insurgent group that used a military-focus strategy, an approach that called for initial military action against government targets and delayed political consolidation until final victory. BARD O'NEILL, *INSURGENCY & TERRORISM: INSIDE MODERN REVOLUTIONARY WARFARE* 41-45 (2d ed. 2001). In 1994, Kony made a major change of strategy, developing a support relationship with Sudan, switching to terror tactics against the Acholi people, and abducting children. Sudan supplied Kony with training, equipment, and sanctuary, likely as a proxy in its own fight against the Sudanese People's Liberation Movement/Army ("SPLM/A") and probably because Ugandan President Yoweri Museveni was supporting the SPLM/A. MAREIKE SCHOMERUS, *THE*

terror campaign was a contributing factor to the 1998 to 2003 conflict between Uganda and the DRC, which led to the 2005 judgment against Uganda in the International Court of Justice (“ICJ”).<sup>4</sup> Kony’s campaign also brought increased attention to the LRA on the part of the international community, to include regional governments, non-governmental organizations, the United States, and the United Nations, and its mission in the DRC.<sup>5</sup>

This article initially examines whether the Uganda-LRA conflict is best characterized as a non-international armed conflict within the meaning of the Common Article 3 of the Geneva Conventions<sup>6</sup> and the 1977 Additional Protocol II. This conflict typology determination has important consequences for assessing the nature of the offenses, adjudicatory fora, and appropriate punishments. Indeed, to a certain extent, the conflict could also be described as a transnational armed conflict, in that the LRA has changed from a rebel group representing Acholi interests in northern Uganda against the government in Kampala, to a terror organization that has conducted large scale rampages against innocent civilians and is currently fighting for its existence in isolated areas of the DRC and southeastern CAR. Despite its origins as a criminal organization responsible for wide-ranging offenses under the Ugandan Penal Code, Kony’s LRA is probably

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LORD’S RESISTANCE ARMY IN SUDAN: A HISTORY AND OVERVIEW 24–33 (2007). Kony turned against the Acholi people, likely because he blamed them for the LRA’s reverses, initiating a systematic terror campaign against them. In any case, the switch from rebel/insurgent to terror tactics destroyed his claim for moral or political legitimacy either in northern Uganda or with the international human rights community. O’Neill describes this kind of reciprocal relationship involving support to an opponent’s internal rebellion as a “mirror image” problem. *See id.*

4. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo. v. Uganda), Judgment, 2005 I.C.J. Rep. 167 (Dec. 19).

5. The UN Security Council has condemned the attacks on civilians, as well as the human rights violations by the LRA in two separate resolutions. *See* S.C. Res. 1653, § 8 (Jan. 27, 2006); S.C. Res. 1663, § 7 (Mar. 24, 2006).

6. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

best characterized as an “organized armed group”<sup>7</sup> with many members subject to prosecution for serious crimes under domestic law, as well as war crimes and crimes against humanity under international humanitarian law, for a wide range of offenses.<sup>8</sup> While Uganda does not come to the table with clean hands, neither can its alleged crimes be compared with the widespread atrocities committed by the LRA; nonetheless, the obligations of international humanitarian law (“IHL”) apply equally to both sides of the conflict. The interests of justice will, no doubt, require an equally broad range of legal responses.

This article raises important questions about how the international community can assist African governments in achieving accountability for *jus in bello* (war crimes) violations—accountability that would be widely perceived as legitimate by the affected peoples and thereby further the long-term interests of international peace and security. This article argues that Ugandan criminal law, to include its

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7. The 1977 Additional Protocol II applies to conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, June 8, 1977, 1125 U.N.S.T. 609 [hereinafter AP II]. Uganda’s accession to Additional Protocol II was effective Sept. 13, 1991. See UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/> (last visited June 19, 2015). By its terms under Article II, Additional Protocol II does not apply to a range of internal disturbances, which raises an issue regarding the demarcation between a law enforcement problem and a non-international armed conflict. The 1977 Additional Protocol I applies to international armed conflicts, or conflicts between two or more states, as well as “armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. . . .” Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Uganda’s accession to Additional Protocol I was effective September 13, 1991. See UNITED NATIONS TREATY COLLECTION, *supra*. However, there has been no claim that Kony is fighting against colonial domination, an alien occupation, or a racist regime in Kampala.

8. Uganda still recognizes the death penalty for serious crimes, despite international pressure to eliminate the practice. The Uganda Penal Code Act of June 15, 1950 imposes the death penalty for a wide range of offenses, including treason, rape, murder, the defilement of a girl under the age of 18, and kidnapping. Uganda has ratified the International Covenant on Civil and Political Rights (“ICCPR”) of December 19, 1966, but not the Second Optional Protocol to the International Covenant on Civil and Political Rights that seeks to abolish the death penalty. *Office of the High Commissioner for Human Rights*, available at <http://indicators.ohchr.org/> (last visited June 15, 2015).

penal statutes, the Amnesty Law, and the 2006 legislation that created a War Crimes Court, have significant shortcomings that would preclude effective accountability for the full range of offenses.<sup>9</sup> This article further argues that the International Criminal Court (“ICC”) cannot—for a range of jurisdictional and substantive reasons—provide an effective forum for adjudicating the range of offenses committed in this conflict. This article concludes that the ICC should establish an agreement-based (i.e., a treaty) hybrid tribunal to prosecute war crimes committed over the course of the Uganda-LRA conflict from 1987 to the present.

## II. THE UGANDA-LRA CONFLICT

### A. A Short History of the Conflict

The insurgency in northern Uganda has its roots in the marginalization of certain ethnic groups in the northern districts after President Yoweri Museveni and the National Resistance Movement/Army (“NRM/A”) came to power in 1986.<sup>10</sup> The NRM/A was touted as an alternative to multi-party democracy and was based in southern Uganda. At first, both politically and spiritually motivated resistance groups opposed the southern-dominated NRM. The LRA then emerged in 1987, initially claiming to be fighting to free the Acholi people of northern Uganda by overthrowing the Ugandan government and installing a regime governed by Kony’s interpretation of the Ten Commandments.<sup>11</sup> Around 1992 to 1994, Kony turned against the Acholi, who he apparently blamed for the LRA’s reverses, initiating a systematic terror campaign against them.<sup>12</sup> In fact, the Acholi refer to the LRA as “Otong tong,” meaning “cut” in the Luo dialect, with the implication that the LRA mutilated people.<sup>13</sup>

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9. *ICC Bill: Why did MPs trap Museveni and save Kony?*, INDEPENDENT (Kampala), Mar. 31, 2010, [allafrica.com/stories/201003310540.html](http://allafrica.com/stories/201003310540.html) (last visited Jan. 8, 2015).

10. ROBERT GERSONY, *THE ANGUISH OF NORTHERN UGANDA: RESULTS OF A FIELD-BASED ASSESSMENT OF THE CIVIL CONFLICTS IN NORTHERN UGANDA* (1997), available at [http://pdf.usaid.gov/pdf\\_docs/Pnacc245.pdf](http://pdf.usaid.gov/pdf_docs/Pnacc245.pdf).

11. OPIYIO OLOYA, *CHILD TO SOLDIER: STORIES FROM JOSEPH KONY’S LORD’S RESISTANCE ARMY* 58 (2013).

12. *Id.* at 63-64.

13. In fact, LRA brutality was often symbolic, such as cutting off ears or lips as a warning to others against cooperating with the Government of Uganda (“GoU”). Ruddy Doom

Since 1994 the LRA's terror campaign has targeted Ugandan civilians, Uganda People's Defence Force ("UPDF") units, Sudanese civilians living near the Ugandan border, Sudanese People's Liberation Army fighters, and international personnel working in LRA affected areas. This terror campaign alienated many Acholi. Finally, Kony proceeded to abduct children as recruits so that his group could form the nucleus of a new Acholi identity. Indeed, Kony achieved international notoriety for his widespread practice of abducting children, typically forcing young boys to become soldiers and awarding young girls as wives to his officers.

### *B. The Nature of the Criminal Offenses*

This long-standing and wide ranging conflict has resulted in a range of IHL claims against both the LRA and the UPDF. In some cases, the LRA members and UPDF soldiers have reportedly violated the Ugandan Criminal Code, while in other cases there have been reports of war crimes and crimes against humanity committed against civilians. Nonetheless, Kony and his senior leaders likely bear primary (command) responsibility for much of the criminal behavior.<sup>14</sup> In any case, although the available information indicates that Kony and others may have committed the serious crimes of which they are accused, a fair trial by an impartial tribunal is needed to test the reliability of this information, to determine whether proper evidence establishes guilt beyond a reasonable doubt, and if so to determine the appropriate sentence.

Kony and the senior leadership of the LRA have been accused of widespread and continuing violations of IHL. The LRA is likely responsible for a wide range of criminal acts, crimes against

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and Koen Vlassenrot, *Kony's Message: A New Koine?* AFRICAN AFF. (Jan. 1, 1999), [http://truth\\_addict.blogspot.com/2012/03/african-affairs-1999-konys-message-new.html](http://truth_addict.blogspot.com/2012/03/african-affairs-1999-konys-message-new.html).

14. Under the Rome Statute of the International Criminal Court, Kony and his leaders would be criminally responsible for the acts of subordinates in that they "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes," and "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution." See Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 28 (July 7, 1998) [hereinafter Rome Statute]. Uganda ratified the Rome Statute on June 14, 2002. UN Treaty Collection, *available at* <https://treaties.un.org> (last visited Aug. 27, 2015).

humanity, and war crimes over the past twenty-seven years.<sup>15</sup> These crimes include the murder, abduction, rape, and mutilation of untold numbers of people, creating a reign of terror in northern Uganda that lasted over twenty years and left almost two million persons displaced from their homes. In addition, there is credible evidence that the LRA engaged in the indiscriminate use of anti-personnel mines, likely supplied by Sudan.<sup>16</sup> Later, after the UPDF attacked the LRA camps in December of 2008, the LRA resumed its terror campaign against civilians largely west and away from Uganda, through parts of the DRC, the CAR and southern Sudan.<sup>17</sup> The Government of Uganda (“GoU”), various non-government organizations, and the ICC have amassed significant evidence of these crimes, as well as Kony’s responsibility for much—if not all—of the staggering human cost that has resulted from this conflict.<sup>18</sup>

The Ugandan security forces, including both the UPDF and the Ugandan Police, have also been accused of a range of criminal offenses in northern Uganda over the past twenty-five years. It is not clear, however, whether any of the claimed offenses rise to the level

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15. Under Article 7 of the Rome Statute, the crime against humanity “means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:” murder, extermination, enslavement, imprisonment, torture, rape, and other specified acts. There is a wealth of evidence that Kony and his senior leaders have planned and directed widespread acts against the civilian populations of a four-nation region over a protracted period of time. *See* Rome Statute, *supra* note 14. Under Article 8 of the statute, war crimes are defined as grave breaches of the Geneva Conventions, as well as “serious violations of the laws and customs applicable in international armed conflict. . . .” *Id.*

16. AVSI, MINE RISK EDUCATION AND VICTIM SUPPORT IN NORTHERN UGANDA, REPORT (Aug. 31, 2005), <http://reliefweb.int/report/uganda/mine-risk-education-and-victim-support-northern-uganda>. This reliable report indicates that unmarked anti-personnel mines were often used to target civilians with emplacement near villages, water sources, and foot paths. Such usage violates the basic IHL principles of necessity, distinction, and proportionality; anti-personnel mines have long been considered problematic because innocent civilians can be injured long after military forces and rebels have departed an area. This leads to the question of where the mines came from: either the mines were planted by the UPDF or were supplied to the rebels by another country, such as Sudan. In any case, both Uganda and Sudan have ratified the Anti-Personnel Mine Ban Convention (the Ottawa Treaty); Uganda ratified the treaty on February 25, 1999 and Sudan ratified it on October 13, 2003. *See* UN Treaty Collection, *available at* <https://treaties.un.org> (last visited Aug. 27, 2015).

17. *See* HUMAN RIGHTS WATCH, THE CHRISTMAS MASSACRE: LRA ATTACKS ON CIVILIANS IN NORTHERN CONGO (2009).

18. ICC, Case Information Sheet, *The Prosecutor v. Joseph Kony, Vincent Otti, and Okot Odhiambo* (2015) ICC-02/04-01/05, <https://www.icc-cpi.int/uganda/kony/Documents/KonyEtAlEng.pdf> (last visited Aug. 17, 2015).



of war crimes, much less “grave breaches” or crimes against humanity, at least within the context of a Common Article 3 non-international armed conflict. In general terms, the Ugandan security forces have been accused of using child soldiers,<sup>19</sup> the detention and use of children for intelligence gathering purposes,<sup>20</sup> and the herding of the Acholi population into displaced persons camps where they were subjected to difficult living conditions.<sup>21</sup>

Arguably, some government actions could be justified under the principle of military necessity, while other actions—at least at the individual level—could be described as criminal actions punishable

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19. HUMAN RIGHTS WATCH, *STOLEN CHILDREN: ABDUCTION AND RECRUITMENT IN NORTHERN UGANDA* 15 (Mar. 2003), <https://www.hrw.org/reports/2003/uganda0303/uganda0403.pdf> (last visited June 15, 2015). Human Rights Watch reports that the UPDF has, at least in the past, recruited children for local defense units and to fight the LRA. Uganda’s 2002 Declaration on Ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict provides: “The Government of the Republic of Uganda declares that the minimum age for the recruitment of persons into the armed forces is by law set at eighteen (18) years. Recruitment is entirely and squarely voluntary and is carried out with the full informed consent of the persons being recruited. There is no conscription in Uganda.” See UN Treaty Collection, *available at* <https://treaties.un.org> (last visited Aug. 27, 2015). In addition, the 2005 UPDF Act, Article 52 (c) sets the minimum age for military recruitment as “at least 18 years of age.” *Id.*

20. CHILD SOLDIERS INTERNATIONAL, *CHILD SOLDIERS GLOBAL REPORT* (2008), [https://www.hrw.org/legacy/pub/2008/children/Child\\_Soldiers\\_Global\\_Report\\_Summary.pdf](https://www.hrw.org/legacy/pub/2008/children/Child_Soldiers_Global_Report_Summary.pdf). Recent reports indicate that the UPDF once had 1,130 child soldiers in its ranks, although the UPDF notes that it can be difficult to know someone’s actual age (i.e., the lack of birth certificates). CHILD SOLDIERS INTERNATIONAL, *LOUDER THAN WORDS – AN AGENDA FOR ACTION TO END STATE USE OF CHILD SOLDIERS* (2012).

21. Patrick Wegner, *A Genocide in Northern Uganda – The ‘Protected Camps’ Policy of 1999 to 2006*, JUSTICE IN CONFLICT, <https://justiceinconflict.org/2012/04/09/a-genocide-in-northern-uganda-the-protected-camps-policy-of-1999-to-2006/> (last visited June 16, 2015). Some writers have described the camps policy as crimes against humanity, inhumane acts, or even genocide, but these claims are probably overstated especially since the Genocide Convention requires a specific intent to eliminate an ethnic or racial group and there is no evidence to that effect. Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, 9 (December 1948) (Uganda’s accession was effective on Nov. 14, 1995), UN Treaty Collection, *available at* <https://treaties.un.org> (last visited Aug. 27, 2015) [hereinafter *The Genocide Convention*]. In any case, while the government moved people into the camps as a security measure against the LRA, it also provided minimal services and eventually received considerable support from the international community. According to the UN High Commissioner for Refugees, the camp population peaked in 2005 with 1.84 million people in 241 camps. And, since most people have now returned to their original homes, the UNHCR closed its office in northern Uganda in 2012. *UNHCR closes chapter on Uganda’s internally displaced people*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Jan. 6, 2012), <http://www.unhcr.org/en-us/news/briefing/2012/1/4f06e2a79/unhcr-closes-chapter-ugandas-internally-displaced-people.html>.

under the Ugandan Penal Code. For example, there is considerable practical merit, if not military necessity, to permitting the use of teenage boys to defend their own homes/villages or to using recently escaped children to help track down their former abductors. And historically, the movement of population groups into protected camps has been seen as a very effective way of “draining the swamp” against rebel groups trying to exploit them.<sup>22</sup> Nevertheless, many of these tactics may violate the law. Regardless, in order to advance long-term peace and security in northern Uganda, all criminal activity—whether committed by LRA soldiers or Ugandan security forces—should be investigated and prosecuted to the fullest extent of the law. While the ICC has indicated that it would investigate complaints against the UPDF, the court noted that it lacked jurisdiction since most alleged criminal acts had reportedly occurred prior to the July 2002 entry into force of the Rome Statute.<sup>23</sup> Nonetheless, the court has not released any reports or filed any indictments against government personnel, even for offenses post-dating July 1, 2002.

### *C. Ugandan Initiatives against the LRA*

Uganda has pursued important legal initiatives in its fight against the LRA. In 1999 Uganda and Sudan signed the Nairobi Agreement, which committed the two countries to cease hostilities against each other and to end support to any rebel groups operating from each other’s territory.<sup>24</sup> In January of 2000 President Museveni signed an Amnesty Act into law that has reportedly induced 26,000 rebels to

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22. The phrase “draining the swamp” refers to the practice of moving population groups from a conflict area, in an effort to separate insurgents/guerrillas from any base of popular support. While this practice can help identify rebels who may be hiding among the civilians and to focus combat operations against them, it can also be counterproductive in terms of encouraging popular disaffection from the government, especially if the move is made in a heavy-handed manner or essential services are not provided. See, for example, the British experience in Malaya during the 1950s. See JOHN A. NAGL, *LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM* (2002).

23. Samson Ntale, *ICC to investigate Ugandan army*, CNN (June 3, 2010), <http://www.cnn.com/2010/WORLD/africa/06/03/uganda.army.icc/>. In fact, ICC prosecutor Luis Moreno-Ocampo indicated that any allegations of UPDF offenses pre-dating July 1, 2002 should be taken before Uganda’s High Court. *Id.*

24. Paul Jackson, *The March of the Lord’s Resistance Army: Greed or Grievance in Northern Uganda?*, *SMALL WARS & INSURGENCIES* 13 (2002).

defect to the GoU.<sup>25</sup> This law provides amnesty for “any Ugandan who has at any time since the 26<sup>th</sup> day of January 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda . . . .”<sup>26</sup> In March of 2002 Uganda and Sudan also signed a bilateral protocol that allowed the UPDF to conduct cross-border operations against the LRA camps in southern Sudan, further increasing the pressure on the rebels.<sup>27</sup>

In December of 2003, Uganda initiated an important legal effort by referring the situation involving the LRA to the ICC. A remarkable move on Uganda’s part, this referral was the first state referral of an action to the ICC. The referral was also significant because it involved offenses within a non-international armed conflict; the referral focused international attention on Kony and his senior lieutenants. Under the Rome Statute, the ICC has subject matter jurisdiction over natural persons involving four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>28</sup>

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25. *Undermining the LRA: Role of Uganda’s Amnesty Act*, CONCILIATION RESOURCES (Aug. 2012), <http://www.c-r.org/news-and-views/comment/undermining-lra-role-ugandas-amnesty-act> (last visited Feb. 3, 2015). See Additional Protocol II, *supra* note 6, art. 6(5) (encouraging authorities in power “to grant the broadest possible amnesty to persons who participated in the armed conflict”). See also Int’l Comm. of the Red Cross, *Customary International Humanitarian Law, Vol. I: Rules*, INT’L COMM. RED CROSS (2005) (Rule 139 recognizes a rule of customary international law urging states to extend amnesty to participants in a non-international armed conflict, except where the person is suspected of a war crime).

26. This statute allows a “reporter” seeking amnesty to receive a certificate of amnesty in exchange for renouncing and abandoning involvement in war or armed rebellion. The Amnesty Act (2000) (Uganda), Part II § 3(1). In addition, the statute creates an Amnesty Commission to manage the demobilization, reintegration, and resettlement of reporters. The amnesty process has been controversial, with periodic charges that it allows criminally culpable persons to escape prosecution and accountability. In 2006, the Uganda Parliament amended the act to provide that a person would be ineligible for a grant of amnesty “if he or she is declared not eligible by the Minister by statutory instrument made with the approval of Parliament.” The Amnesty (Amendment) Act (2006) (Uganda). Part II (the amnesty provisions) lapsed on May 23, 2012, but was reenacted in its original form in May 2013. See Statutory Instruments (2012) No. 34, The Amnesty Act (Declaration of Lapse of the Operation of Part II) Instrument (2012); *Ugandan Government Renews Amnesty Policy/IC Citizen*, INVISIBLE CHILDREN, <http://invisiblechildren.com/blog/2013/05/30/ugandan-government-renews-amnesty-policy-ic-citizen/> (last visited June 12, 2015).

27. *Army happy with Sudan protocol on LRA*, IRIN NEWS (Mar. 19, 2002), <http://www.irinnews.org/news/2002/03/19/army-happy-sudan-protocol-lra> (last visited Jan. 12, 2017).

28. Rome Statute, *supra* note 14. Under Article 12 and 13, the ICC has jurisdiction only if the offenses were committed on the territory of a state party, by a state party or one its nationals, or under referral by the UN Security Council.

The court has jurisdiction over war crimes “when committed as part of a plan or policy or as part of a large-scale commission of such crimes,” but only for crimes committed after the statute came into effect in July 2002.<sup>29</sup>

Subsequently, in September of 2005, the ICC issued arrest warrants against Joseph Kony and four of his senior leaders<sup>30</sup> for crimes against humanity and war crimes.<sup>31</sup> Later, after the 2008 breakdown in peace negotiations between Kony and the GoU, the indictments would help provide the GoU with a political condition precedent for renewed military action against the LRA. Finally, on May 25, 2010, the Ugandan parliament adopted the International Criminal Court Act,<sup>32</sup> a statute that allows for the prosecution of international crimes in Uganda and cooperation between the GoU and the ICC.<sup>33</sup>

Uganda has also pursued significant political-military initiatives with the LRA that have changed the nature of the conflict. In

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29. *Id.* art. 8. Article 8 (e) (vii) also defines the “[c]onscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities” as a serious violation of the laws and customs of war in non-international armed conflict.

30. Vincent Otti (later executed on Kony’s orders in 2007), Raska Lakwena (later killed by Ugandan forces in 2006), Okot Odhiambo (LRA deputy commander and still at large), and Dominic Ongwen (recently captured by US forces and pending trial at The Hague).

31. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on July 8, 2005, as Amended on Sept. 27, 2005; Prosecutor v. Kony (July 8, 2005) Case No. ICC-02/04-01/05, Warrant of Arrest for Vincent Otti; Prosecutor v. Kony (July 8, 2005) Case No. ICC-02/04-01/05, Warrant of Arrest for Raska Lakwena Issued; Prosecutor v. Kony (July 8, 2005) Case No. ICC-02/04-01/05, Warrant of Arrest for Okot Odhiambo; Prosecutor v. Kony (July 8, 2005) Case No. ICC-02/04-01/05, Warrant of Arrest for Dominic Ongwen. According to the decision of Pre-Trial Chamber II (July 11, 2007) No. ICC-02/04-01/05-248, the proceedings against Lakwena have been terminated based upon reliable evidence that he was killed on August 12, 2006. The warrants are available on the International Criminal Court website, *available at* <https://www.icc-cpi.int/Pages/Home.aspx>. The warrant against Vincent Otti is apparently still valid, even though the LRA has confirmed his death. *Uganda’s LRA Confirm Otti Death*, BBC NEWS (Jan. 23, 2008), <http://news.bbc.co.uk/2/hi/africa/7204278.stm>. On February 16, 2015, Pre-Trial Chamber II severed the proceedings against Ongwen from the remaining co-defendants. ICC, Case Information Sheet, The Prosecutor v. Dominic Ongwen (Mar. 26, 2015) Case No. ICC-02/04-01/15, <https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf>.

32. The International Criminal Court Act (2010).

33. James Ellis & Dan Kuwali, *Uganda*, 2011 Y.B. INT’L HUMANITARIAN LAW 14, *Correspondents’ Reports* (indicating that there are several notable omissions from the 2010 ICC Act, including conduct that was not a crime at the time of its commission, a lack of provisions on retroactivity, and rules of international law, including IHL, that raise questions about fair trial standards).

September 2005, as a result of negotiations, LRA elements moved into camps in the northeastern DRC and suspended military operations.<sup>34</sup> Effectively, this brought about a *de facto* end to the non-international armed conflict in northern Uganda and the peace there that lasts to this day. In August of 2006 the LRA and the GoU signed a Cessation of Hostilities Agreement and the parties participated in peace talks.<sup>35</sup>

In one important effort, the peace delegates signed an Agreement on Accountability and Reconciliation.<sup>36</sup> This effort resulted in agreement to try serious offenses through formal Ugandan justice measures with lesser offenses handled through traditional reconciliation practices. In part, this agreement was intended to meet the complementary requirements of the Rome Statute, perhaps providing a way for Uganda to procure the withdrawal of the ICC indictments.<sup>37</sup> Kony sent a delegation to negotiate on his behalf, but he repeatedly failed to appear in person at announced peace conferences, much less sign the negotiated Final Peace Agreement in November 2008.<sup>38</sup> Many people questioned whether Kony was negotiating in good faith, believing that he never intended to give up his fight; others, however, believed that Kony would sign a peace agreement but only if the ICC first withdrew the indictments.<sup>39</sup> Thus, even though Kony and his senior leaders may have refused to sign because the pending indictments were not or could not be withdrawn, it is also hard to fault the ICC for not doing so as a condition precedent to any peace agreement. Nonetheless, after Kony failed to

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34. See HUMAN RIGHTS WATCH, *supra* note 17.

35. LRA-Government Agreement on Cessation of Hostilities, Uganda—The Lord's Resistance Army, Aug. 26, 2006. The parties agreed "to cease all hostile military action aimed at each other and any other action that may undermine the Peace Talks," with the LRA assembling in camps in southern Sudan, and agreed that any disputes arising under the agreement "shall be resolved by the Mediation Team." In June 2008 the LRA reportedly attacked civilians in southern Sudan, leading the UPDF attack to plan attacks against the LRA camps near Garamba National Park. *Ugandan Rebels 'Prepare for War,'* BBC NEWS AFRICA (June 6, 2008), <http://news.bbc.co.uk/2/hi/africa/7440790.stm>.

36. Agreement on Accountability and Reconciliation, Uganda - The Lord's Resistance Army (June 29, 2007).

37. See generally Eric S. Fish, Comment, *Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions*, 119 YALE L. J. 1703 (2010).

38. Mark Tran, *Ugandan Rebel Leader Fails to Sign Peace Deal*, GUARDIAN (Apr. 7, 2008), <http://www.theguardian.com/world/2008/apr/11/uganda>.

39. Mark Kersten, *Peace, Justice and Politics in Northern Uganda*, EUR. COUNCIL FOREIGN AFF. (2013), [http://www.ecfr.eu/page/-/IJP\\_Uganda.pdf](http://www.ecfr.eu/page/-/IJP_Uganda.pdf).

sign the agreement, Uganda went forward with its efforts to implement the Juba talks to include establishing the International War Crimes Division as a special division of the Ugandan High Court.<sup>40</sup>

Eventually, Uganda resumed military operations against him and his organization.<sup>41</sup> In December of 2008, the UPDF—with permission from the DRC—conducted a joint air-ground attack, known as Operation Lightning Thunder,<sup>42</sup> on the LRA's base camps near Garamba National Park.<sup>43</sup> While the initial attack was marginally successful, it also resulted in a diversion of the LRA activities over a much larger area of Northern DRC and into the CAR (namely, west and largely away from northern Uganda).<sup>44</sup> In 2012, as a result of the

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40. Kristy McNamara, *Seeking Justice in Ugandan Courts: Amnesty and the Case of Thomas Kwoyelo*, 12 WASH. U. GLOBAL STUD. L. REV. 653, 658 (2013).

41. The 1907 Hague Regulations address military-to-military armistice agreements. On one hand, Article 40 provides that “[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.” On the other hand, perfidy, that is acts inviting an adversary’s detrimental reliance on a protected status, has been a traditional concern under IHL. See Sean Watts, *Law-of-War Perfidy*, 219 MIL. L. REV. 106 (2014). Here, it is clear that the LRA committed a material breach of the original agreement, both in terms of its renewed attacks in southern Sudan and with the movement to new camps near Garamba National Park. Nonetheless, Uganda did make further attempts to negotiate with Kony through November 2008 before launching Operation Lightning Thunder. Hence, it would be difficult to argue that the UPDF committed an act of perfidy with its December attack on the camps.

42. The Ugandan-led operation included both Sudanese and Congolese soldiers in support. Richard Downie, *The Lord’s Resistance Army*, CTR. STRATEGIC & INT’L STUD. (2001), <http://csis.org/publication/lords-resistance-army>. Arguably, the Uganda-DRC bilateral political relationship has been the strategic center of gravity in renewed fight against Kony and the changed relationship (from the 1998-2003 period) has been a positive and enduring development.

43. Garamba National Park has been a Congolese park since 1938 under the management authority of the Congolese Institute for Nature Conservation (“ICCN”) and has been on the UN Educational, Scientific and Cultural Organization (“UNESCO”) World Heritage list since 1980. The park “contains the last worldwide population of the northern white rhinoceros, endemic sub-species of Congolese giraffe and a mixed population of elephants, combining forest elephants, bush elephants and individuals demonstrating morphological characteristics common to the two elephant sub-species.” Garamba National Park, UNESCO, <http://whc.unesco.org/en/list/136list/136> (last visited Feb. 19, 2015). Reportedly, LRA members have poached a range of animals while in search of food. *Poaching Onslaught in Garamba National Park*, AFRICA GEOGRAPHIC (June 13, 2014), <http://africageographic.com/blog/poaching-onslaught-in-garamba-national-park/> (last visited Jan. 12, 2017). In that sense, LRA members may have committed war crimes involving cultural property within the meaning of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

44. Ledio Cakaj, *On the Heels of Kony: The Untold Tragedy Unfolding in the Central African Republic*, ENOUGH PROJECT (June 24, 2010), <http://www.enoughproject>.

deteriorating regional situation, the United States deployed special operations forces to Obo, in southeastern CAR, to assist with efforts to capture Kony and his lieutenants.<sup>45</sup> Overall, Uganda's actions reignited the earlier conflict in a new area and had a significant impact on previously unaffected and innocent people. Recently, Ongwen, one of Kony's indicted lieutenants, surrendered to US forces, renewing the prospect for an international crimes tribunal that might help bring justice to some of his victims.<sup>46</sup> Nevertheless, even with President Museveni's efforts to involve the ICC in the fight against the LRA, he has still questioned the utility of the 1949 Geneva Conventions, as well as the ICC itself, in this conflict with Kony.<sup>47</sup>

*d. Whither a Transnational Armed Conflict?*

In sum, what began as a non-international armed conflict (a rebellion) in northern Uganda has become a regional conflict affecting millions of people in a four-country area of Central Africa; a conflict that has drawn in members of the international community to include the United States, France (in terms of support to the Government of the CAR), the UN Mission in the DRC, and the ICC. Thus, this conflict can now be considered an internationalized non-international armed conflict, or a transnational armed conflict, at least through the period of 2006 to 2008.<sup>48</sup> While this article focuses on ensuring accountability, we must first examine the nature of the conflict and the combatant status of LRA members before turning to the issue of how to achieve that accountability. Indeed, the extent to

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org/publications/heels-of-joseph-kony-commander-of-lords-resistance-army (last visited Jan. 12, 2017).

45. Jeffrey Gettleman, *In Vast Jungle, U.S. Troops Aid in Search for Kony*, N.Y. TIMES (Apr. 29, 2012), <http://www.nytimes.com/2012/04/30/world/africa/kony-tracked-by-us-forces-in-central-africa.html?pagewanted=all>.

46. *LRA Rebel Dominic Ongwen Surrenders to U.S. Forces in CAR*, BBC NEWS AFRICA (Jan. 7, 2015), <http://www.bbc.com/news/world-africa-30705649>.

47. Yoweri Kaguta Museveni, State of the Nation Address by President of the Republic of Uganda Kampala, State House of Uganda (June 5, 2014), *transcript available at* [www.statehouse.go.ug/media/presidential-statements/2014/06/05/state-nation-address-he-yoweri-kaguta-museveni-president-re](http://www.statehouse.go.ug/media/presidential-statements/2014/06/05/state-nation-address-he-yoweri-kaguta-museveni-president-re). See also Jeffrey Gettleman, *Senior Rebel from Uganda to Be Moved to The Hague*, N.Y. TIMES (Jan. 13, 2015), <http://www.nytimes.com/2015/01/14/world/africa/ugandan-rebel-commander-to-be-tried-at-international-criminal-court.html>.

48. The term "transnational armed conflict" has no legal significance; the term is not part of international humanitarian law. The term reflects the fact that the conflict has the nature of both an international and a non-international armed conflict.

which the conflict can be characterized as either a non-international or an international armed conflict, to include whether LRA members have combatant status, has important bearing on whether such members can be held accountable for certain offenses under IHL.

### III. CHARACTERIZING THE CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW

#### A. Introduction

The nature of the conflict with the LRA affects national obligations under IHL. The 1949 Geneva Conventions created a bifurcated framework, providing for protections in either international (Common Article 2) or non-international (Common Article 3) armed conflicts. At that time, the drafters were focused primarily on international armed conflict and viewed non-international armed conflict primarily in terms of a rebellion or civil war within a single country.<sup>49</sup> Still, the 1949 Geneva Conventions afforded major improvements in the legal protection of victims of international conflicts—wars between sovereign nations, while providing limited protections to non-combatants in non-international armed conflict.<sup>50</sup> Critically, for the purposes of the Uganda-LRA conflict, Common Article 3 provided a less expansive—and less clear—set of protections for the wounded and sick, prisoners of war, and civilians than it did for Common Article 2 conflicts. Eventually, the international community addressed this gap in international law with the 1977 Additional Protocol (“AP”) II.<sup>51</sup> AP II was designed to make international humanitarian law more complete and universal, and to provide expanded obligations in a non-international armed conflict.

The Uganda-LRA conflict raises important issues regarding the applicability of domestic and international humanitarian law: the

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49. GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 45 (2012).

50. Under Common Article 2 of the Geneva Conventions of 1949, an international armed conflict is defined as a “declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Common Article 3 applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. . . .” *See supra* note 6.

51. *See* AP II, *supra* note 7.



conflict began in northern Uganda, involving some level of criminal activity (e.g., internal disturbances, rebellion, or insurgency), clearly raising issues under the Ugandan Penal Code, and yet the conflict also has expanded and evolved to include large sections of Sudan, the DRC, and the CAR. This raises controversial questions, at least in certain areas of northern Uganda and during certain periods, regarding the use of deadly force by UPDF in response to certain LRA activities: at what point did the conflict transition from a law enforcement problem to a non-international armed conflict warranting the application of the IHL?<sup>52</sup> In effect, what began as internal disturbances evolved into some level of a non-international armed conflict, and eventually spread into a transnational armed conflict.<sup>53</sup> Thus, this conflict raises several important issues regarding the applicability of different IHL norms. Among these are the definition of non-international armed conflict, the difference between

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52. Under general principles of international human rights law (a law enforcement paradigm), the UPDF and the Uganda Police would have been limited in the use of deadly force based upon a conduct-based standard (e.g., imminent threat to others) for targeting LRA members, while the IHL can permit a broader, status-based standard. In any case, The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ("BPUFF"), adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27 to Sep. 7, 1990, provides a minimum standard for Ugandan law enforcement operations under international human rights law. UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER, BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS BY LAW ENFORCEMENT OFFICIALS (1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>. This standard is based in part on the ICCPR, and clearly envisions the use of graduated force, with a presumption that law enforcement officers, as well as military personnel conducting law enforcement operations, can use deadly force to respond to imminent threats. See ICCPR, *supra* note 8.

53. A nation, such as Uganda, is often reluctant to recognize that a domestic situation has changed from a law enforcement problem to one involving the use of armed forces subject to the constraints of IHL. In part, a nation may be reluctant to admit to an inability to enforce its own laws with an implicit invitation for international scrutiny over its actions, as well as those of its adversary; in part, a nation may also believe that an acknowledgement regarding the application of IHL also carries an implicit political recognition of the adversary's status. Andrew J. Carswell, *Classifying the Conflict: A Soldier's Dilemma*, 91 INT'L REV. RED CROSS, 143, 150 (2009). Common Article 3 to the Geneva Conventions provides: "The application of the preceding provisions shall not affect the legal status of the conflict." See *supra* note 5. Moreover, Additional Protocol II, Article 3 (1), provides: "Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a state or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State." See AP II, *supra* note 7, art. 3 (1). This section clearly indicates that a State can recognize the application of AP II to its internal armed conflict without making an implicit recognition of the sovereignty demands of dissident armed forces or an opposing organized armed group. *Id.*

combatants and civilians (i.e., what constitutes an organized armed group) and when a civilian can be considered to be engaged in “direct participation in hostilities.” This discussion leads directly to the question whether the LRA members can be held accountable for all offenses committed in violation of Ugandan law, or whether the GoU would voluntarily extend combatant’s privilege to the killing of UPDF soldiers and other government employees.

The LRA conflict has spread over four Central African nations, each of which has different obligations under IHL. Uganda has been a state party to the Geneva Conventions since 1964 and ratified AP II in 1991.<sup>54</sup> This means that Common Article 3, as well as the additional protections under the AP II, have possible application to its internal conflict with the LRA.<sup>55</sup> Sudan, the DRC, and the CAR are also state parties to the Geneva Conventions and APs I and II, but each with different accession/ratification dates.<sup>56</sup> The critical point here is that Common Article 2 could be applicable to the Sudan, at least to the extent that Sudan used the LRA as a proxy in its fight against Uganda’s support to the Sudan People’s Liberation Army (“SPLA”) and the Sudan People’s Liberation Movement (“SPLM”).

The Rome Statute has incomplete reach over the range of offenses committed in this conflict. Uganda, Sudan, the DRC, and the CAR have all signed the Rome Statute, although Sudan later withdrew in 2008.<sup>57</sup> In any case, the Rome Statute did not come into

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54. AP II, *supra* note 7.

55. *See id.* AP II would not, however, be applicable to the first three or four years of the conflict involving the HSMF/emergent LRA, that is until the date that the protocol became effective against Uganda. *See* AP II, *supra* note 7. Many provisions of the 1949 Geneva Conventions, as well as parts of AP II, would be considered binding upon Uganda as customary international law. *See id.*

56. Sudan’s accession to the Geneva Conventions was effective on March 23, 1985, but its accession to AP I was not effective until September 7, 2006 and its accession to AP II was not effective until January 13, 2007. *See supra* note 7. The DRC’s succession to the Geneva Conventions was effective on June 30, 1960 and its accession to both AP I and AP II were effective on January 13, 2007. *Id.* The CAR’s succession to the Geneva Conventions was effective on July 23, 1996, and its accessions to AP I and AP II were effective on January 17, 2005. *See* United Nations Treaty Collection, <https://treaties.un.org/Pages/Home.aspx> (last visited Feb. 3, 2015). This means that Common Article 3 and AP II are both applicable to most, but not all periods and areas, of the Uganda-LRA conflict.

57. Sudan signed the Rome Statute on September 8, 2000, but later withdrew on August 26, 2008 with the following note to the UN Secretary General: “Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.” The DRC’s ratification occurred on May 3, 2004 and the

effect until July of 2002, making it inapplicable for the first fifteen years of the LRA's existence. Critically, for the interests of justice and accountability, this means that many early war crimes committed by either the LRA and the UPDF (or potentially other parties) cannot be addressed through the ICC. While the LRA-Uganda conflict did range over part of what is now the independent Republic of South Sudan, Juba did not gain its independence from Sudan until July of 2011, long after the LRA departed its territory.<sup>58</sup>

### *B. The Nature of the Conflict*

One initial problem to seeking accountability involves the definition of a non-international armed conflict, and how this affects the legal obligations of the parties to that conflict.<sup>59</sup> In effect, there are two types of non-international armed conflict in IHL. Common Article 3 applies to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," without further qualification. Yet, AP II applies to armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."<sup>60</sup> This leads to the issue whether the LRA qualifies as an "organized armed group"—with territorial control—triggering the application of AP II. In any case, Common Article 3 provides the minimum standards for humanitarian treatment applicable during armed conflict, with AP II imposing additional requirements on signatory countries and "organized armed groups" that exercise territorial control.

The International Criminal Tribunal for the Former Yugoslavia ("ICTY") has held that "armed conflict of a non-international character may only arise when there is protracted violence between

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CAR's ratification occurred on October 3, 2001. *See* United Nations Treaty Collection, *supra* note 56.

58. South Sudan Country Profile, BBC NEWS AFRICA, <http://www.bbc.co.uk/news/world-africa-14069082>.

59. *See generally* Int'l Comm. of the Red Cross, *How is the term "Armed Conflict" defined in international humanitarian law?*, ICRC OPINION PAPER (Mar. 2008).

60. AP II, *supra* note 7.

governmental authorities and organised armed groups, or between such groups, within a State.”<sup>61</sup> In fact, the ICTY has elaborated on the intensity of the “protracted armed violence” required and has developed a robust list of factors that can be used in a totality of the circumstances test.<sup>62</sup> Likewise, the ICTY has also elaborated on the second requirement involving a conflict with an “organized armed group.”<sup>63</sup> On one hand, the Ugandan government was faced with internal civil strife and “banditry,” meaning that the Uganda Penal Code applies in all parts of the country, whether or not IHL overlays on that or not, for certain situations. On the other hand, the fact that fighting took place only in certain parts of the country and not others does not necessarily preclude the application of the IHL provided that the criminal acts were sufficiently connected with the ongoing conflict.

It is apparent that Uganda has been facing protracted armed violence by an organized armed group under “responsible command,” but one that never established any degree of territorial control. The group has functioned as Kony’s alter-ego and he has administered “discipline,” at least in the sense that he has executed persons who dissented from his decisions.<sup>64</sup> He did establish a political wing with

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61. Prosecutor v. Haradinaj (Nov. 29, 2012) Case No. IT-04-84bis-T, Public Judgment with Confidential Annex, para. 393 (Int’l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

62. See, e.g., Prosecutor v. Milosevic (June 16, 2004) Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, para. 27 (Int’l Crim. Trib. for the Former Yugoslavia). The Court considered the length or protracted nature of the conflict and seriousness and increase in armed clashes, the spread of clashes over territory, the increase in the number of government forces sent to the territory, and the weapons used by both parties. See also Prosecutor v. Limaj (Nov. 30, 1995) Case No. IT-03-66-T, Judgment, para. 90 (Int’l Crim. Trib. for the Former Yugoslavia) (adding whether the conflict has come the attention of the UN Security Council and whether any resolutions have been passed on the matter).

63. Prosecutor v. Haradinaj (Apr. 3, 2008) Case No. IT-04-84-T, Judgment, para. 49 (Int’l Crim. Trib. for the Former Yugoslavia). The Court considered factors such as whether the group has a command structure with disciplinary rules; whether the group has a headquarters; whether the group controls territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate, and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice to negotiate and conclude agreements such as cease-fire or peace accords.

64. On October 2, 2007, Kony had his deputy Vincent Otti executed, likely for disagreeing with him on certain issues. Otti ‘Executed by Uganda Rebels,’ BBC NEWS AFRICA (Dec. 21, 2007), <http://news.bbc.co.uk/2/hi/africa/7156284.stm>. Moreover, the LRA has often imposed harsh discipline on new abductees, both as a means of transforming the person into a

an external spokesman, but this was likely a fiction created for propaganda purposes in that he has never offered any form of positive political program for the Acholi people. He established a command structure for his military wing, complete with military ranks, uniforms and unit structures. At least in the early years, the LRA received arms, supplies and sanctuary from Sudan, but whether and when that relationship ended is unclear. The LRA never controlled territory, except when in base camps in the DRC during the 2006 to 2008 period during which time Kony conducted negotiations—likely not in good faith—with the Ugandan government. Kony did, however, operate with impunity over a large area of Uganda north of the Victoria Nile, forcing the UPDF to conduct large scale operations to track him down. It is this lack of territorial “control” in northern Uganda that may preclude the application of AP II to this conflict.<sup>65</sup>

Nonetheless, the Uganda-LRA conflict has been of sufficient duration (over twenty-five years) and intensity (a considerable number of persons have been killed or displaced throughout the country), that one could reasonably conclude that the conflict is a “non-international armed conflict.” Typically, the LRA would raid a village, killing or kidnapping scores of innocent civilians, while the government was forced to respond with large scale military security and search operations. One fact here that should be dispositive is that the Ugandan government has felt obligated to respond to the armed conflict with the use of its regular armed forces; clearly, the Ugandan government believes that it has been facing much more than a law enforcement problem and is engaged in a fight with a belligerent group.

The explicit language in Common Article 3 clearly refers to a conflict that occurs in the territory of one country and against its armed forces; it appears to exclude conflicts involving a State and an organized armed group in a neighboring State. Nonetheless, even though Uganda is no longer faced with an adversary in its territory, that fact should not change the characterization of the conflict.

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new member and as a means of preventing escape. Opiyo Oloya describes the process as *Lwoko wii Cibilian* (“Washing the Civilian Mind”). See OLOYA, *supra* note 11, at 82-90.

65. There is evidence that the LRA did control some parts of Eastern Equatoria (southern Sudan) during the 1990s, but this could be best construed as the use of base camps for operations against either the SPLM/A as a proxy for Sudan or against the Acholi in northern Uganda. Schomerus, *supra* note 3, at 20-21.

Uganda has continued its fight against the LRA, with permission from the DRC and the CAR, and—while the LRA has committed widespread atrocities against Congolese and Central African peoples—the LRA has not taken up arms against those other governments. The existence of state consent for UPDF operations means that an international armed conflict does not exist between Uganda and its neighbors; the lack of an LRA fight against either the DRC or the CAR means that a non-international armed conflict does not exist between the LRA and either the DRC or CAR. Instead, the DRC and the CAR face a serious threat from an “organized armed group,” originating in Uganda, which necessitates the use of military forces supported by intelligence and air assets that neither country has. Thus, the continued UPDF operations can be justified on a defense of others rationale; indeed, Uganda has a moral obligation to track down and destroy LRA elements committing continuing crimes against innocent civilians in neighboring countries. On the balance, Common Article 3 should apply to Uganda’s internal and external conflicts with the LRA.

At least during the early years of the Uganda-LRA conflict, there is some evidence that Sudan provided the LRA with arms, equipment, and sanctuary, in part because Uganda was providing the same support to the SPLM/A.<sup>66</sup> However, it is difficult to assess the nature and extent of the actual conflict between Sudan and Uganda during that period. Nonetheless, each government used its neighbor’s opposing non-state group to some extent as a proxy in the low-level conflict that existed between them. In turn, this raises a question whether Sudan used the LRA to conduct an “armed attack” against Uganda, thereby creating a bilateral, international armed conflict between Sudan and Uganda until the cessation of that reciprocal support.

The 1986 decision of the ICJ in *U.S. v. Nicaragua* provides a useful analysis under the UN Charter for the difference between an illegal use of force and an “armed attack,”<sup>67</sup> an important threshold in

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66. See Schomerus, *supra* note 3, at 24-28.

67. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1986 I.C.J. 14 (June 27, 1986). Article 2 (4) of the UN Charter proscribes “the threat or use of force against the territorial integrity or political independence of any state,” but Article 51 recognizes the inherent right of self-defense if an “armed attack” occurs. Thus, if Uganda was not confronted with an “armed attack,” it did not have the right to respond with armed force against Sudan. This means that an “international armed conflict”

assessing the nature of the international armed conflict. In part, the court examined the level of support provided by Nicaragua to the proxy groups fighting in El Salvador, making a distinction between groups that acted independently and those that acted under the “effective” control of the state actor. The *Nicaragua* court found that Nicaragua’s arming and training of guerrillas constituted a “use of force” against El Salvador, but held that such actions did not arise to the level of an “armed attack” which would have justified self-defense actions under Article 51.

The court’s characterization of Nicaragua’s activity as a “frontier incident,” that is hostile but localized military actions, suggests that limited support to proxy groups might fall short of the “armed attack” threshold. In fact, both the LRA in its fight against Uganda and the SPLM/A in its fight against Sudan remained largely independent actors, except for a possible period when the LRA operated from base camps in southern Sudan, but without ever ceding control to its state sponsors.<sup>68</sup> In other words, unless Sudan ever took “control” over (helped organize, plan, or direct) LRA operations, the conflict in northern Uganda likely remained non-international.<sup>69</sup> On one hand, Sudan would never admit to taking control of the group and would have every reason to hide evidence of its involvement with a notorious organization. On the other hand, Kony has long claimed political, military, and even moral status in representing Acholi interests; he would never acknowledge anything other than an independent political-military relationship with Sudan.

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may not have actually existed between the two nations, despite the feuding proxy groups supporting opposing sides.

68. See also Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 4, 649-88 (2007) (explaining the differences between the “effective control” test in the *Nicaragua* decision and the broader “overall control” test in the *Tadić* decision). Cassese believes that the more stringent effective control test is appropriate where the issue is whether a state is responsible for the actions of individuals in violation of IHL, while the overall control test is more appropriate where the issue is state responsibility for organized armed groups or militia units. See *id.* at 657.

69. The International Law Commission provides: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON STATE RESPONSIBILITY (2001), art. 8, [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

Arguably, Sudan may still be held accountable for breaches of IHL as a matter of state responsibility, even if the fight remained a non-international armed conflict. This, in turn, raises questions about the identity of any Sudanese officials who supported the LRA, the nature and extent of their support to the organization, and whether any of their acts could be imputed to Sudan. Indeed, while the bilateral conflict between the two nations ostensibly ended with the 1999 Nairobi Agreement, there have been periodic allegations (likely unprovable) that some officials continued that support relationship for an indeterminate period thereafter.

The Uganda-LRA conflict, at least through 2006 when the LRA moved to new base camps in the DRC, is probably best characterized as a non-international armed conflict within the meaning of Common Article 3 but excluding AP II, despite the LRA's capability to range over broad territory.<sup>70</sup> First, absent compelling evidence of control by Sudan or other outside state actors, the conflict has involved an "organized armed group" that waged an insurgency/terror campaign against Uganda. Indeed, it is only during the 1998-2003 conflict between Uganda and the DRC that the conflict could have included an "international armed conflict" component.<sup>71</sup> Second, the LRA has

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70. See generally Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, HARV. U. PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES. (2006) (examining whether and how the existing rules of IHL should be adapted to address problems raised by the extraterritorial character of the fight against transnational armed groups). One consequence of this determination that the conflict is non-international is that neither Kony nor members of the UPDF can be held criminally liable for "grave breaches" against civilians in violation of Geneva Convention IV, *supra* note 6, Articles 146-47. See also CORN ET AL, *supra* note 49, at 475-83 and 496-98 (citing *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defense Motion on Jurisdiction (Aug. 10, 1995), and *Prosecutor v. Delalic et al., Celebici*: Case No. IT-96-21-T (Nov. 16, 1998)). Both the *Tadic* and the *Celebici* cases suggest an erosion of the distinctions between international and non-international armed conflict, especially as it relates to serious war crimes. Nonetheless, the analytic distinction remains and the "extradite or prosecute" obligation under Article 146 would probably not apply even though serious violations of the Common Article 3 are still arguably war crimes subject to universal jurisdiction.

71. The conflict did take on some early overtones of a transnational armed conflict with offenses against the international community. For example, the LRA is probably responsible for attacks on MONUC peacekeepers, to include a 2006 attack near Garamba National Park that left eight dead. *Armed Group Kills 8 UN Peacekeepers in Garamba Park*, IRIN NEWS (Jan. 23 2006), <http://www.irinnews.org/report/57888/drc-armed-group-kills-8-un-peacekeepers-in-garamba-park>. Such attacks, if made after July 2002, would be a war crime under the Rome Statute. See Rome Statute, *supra* note 14. Article 8 (2)(b)(iii) provides that it is a war crime to attack peacekeepers "as long as they are entitled to the protection given to civilian or civilian objects under the international law of armed conflict."



never controlled territory, except in the sense that it directed activities over a specific geographic area, making it difficult to argue for the application of AP II to this conflict. Third, the LRA's move to new base camps is legally significant because the LRA ceased operations in northern Uganda and entered peace negotiations with the GoU that lasted through November of 2008. Peace and security returned to northern Uganda for the first time in twenty years; this means that the non-international conflict between the LRA and the GoU likely ended, at least during that time.

The *de facto* peace between the LRA and GoU was short-lived, raising a question about how to characterize the conflict after December of 2008. By late 2008 the GoU had apparently concluded that Kony was not negotiating in good faith and that the threat posed by his group had to be eliminated through resumed combat operations. The December 2008 UPDF attack on the LRA base camps caused the group to initiate a new terror campaign, largely in a fight for its existence as it sought food and supplies while trying to escape pursuing Ugandan forces by fleeing west and away from Uganda. It is this new terror campaign that has resulted in widespread attacks on defenseless Congolese and Central African peoples, and has brought further US and international support to the Ugandan fight. Arguably, the post-2008 combat operations against the LRA are not a resumption of the earlier non-international armed conflict, but represent self-defense actions, or counter-terrorism operations, by affected regional governments against an imminent threat from an organized armed group.

### *C. The Combatant Status of LRA Members*

The LRA poses vexing problems in terms of the combatant status of its members under the Third Geneva Convention. Initially, there is the question whether the organization itself transitioned from a criminal enterprise, subject solely to Ugandan criminal laws, to belligerent status under IHL, or has become some combination of both criminal and belligerent. This poses important political and legal issues for Uganda. In turn, this leads to the issue whether the LRA members are combatants who can be targeted based on status and later subjected to prosecution upon capture. Finally, the combatant status of LRA members raises two additional complications, one involving child soldiers and one involving kidnapped persons. Can

children be targeted as combatants and then later prosecuted for criminal offenses?

There is a significant question about the status of kidnapped persons, primarily children, who were subsequently forced to become either soldiers (the young boys) in the organization or wives (the young girls) to LRA soldiers.<sup>72</sup> Treaty-based and customary international law<sup>73</sup> generally proscribes the recruitment of children under the age of fifteen into the armed forces, as well as their participation in hostilities. Indeed, the LRA has not been known to take voluntary recruits in over twenty years; the kidnapping of children, some as young as eight, has been the preferred “recruiting practice.”<sup>74</sup> In a typical attack on a village, the LRA members rounded up families, young and old, and often forced children to kill their own parents, likely as a psychological means of severing the

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72. Arguably, many LRA members, to include even former senior officers such as ICC defendant Dominic Ongwen who was abducted at age ten, and who grew to consider people like Vincent Otti as father figures, are victims as much as they are combatants responsible for war crimes. Ledio Cakaj, *The Complex Story of a Child Soldier*, WASH. POST, (Jan. 12, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/01/12/the-complex-story-of-a-child-soldier/>.

73. Under the 1977 Additional Protocol I, applicable to international armed conflict and no doubt reflecting customary international law, children may not be recruited or take part in hostilities. Article 77 (3) provides that if, “despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.” The 1989 Convention on the Rights of the Child, Article 38, ratified by Uganda on August 17, 1990, extends legal rights and protections to children accused of crimes. The 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Article 4, provides that: “1. Armed groups that are distinct from the armed forces of a State *should not*, under any circumstances, recruit or use in hostilities persons under the age of 18 years. 2. States Parties shall take *all feasible measures* to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices [emphasis added].” Uganda acceded to the protocol on May 6, 2002. See also The African Charter on the Rights and Welfare of the Child, which was ratified by Uganda on August 17, 1994 and entered into force on November 29, 1999; Article 22 proscribes the recruiting of child soldiers and their direct participation in hostilities. See generally Int’l Comm. of the Red Cross, *Customary International Humanitarian Law*, *supra* note 25, Rules 136, 137. Rule 137 provides a useful analysis of customary international law regarding the status of children while participating in hostilities.

74. See Christian Boatswain, *Uganda: Child Soldiers at Centre of Mounting Humanitarian Crisis*, U.N. NEWS CENTRE, <http://www.un.org/events/tenstories/06/story.asp?storyID=100> (last visited Feb. 19, 2015). Amnesty International estimates that eighty percent of the LRA combatants are kidnapped children. Kevin C. Dunn, *Killing for Christ? The Lord’s Resistance Army of Uganda*, 103 CURRENT HISTORY 206 (2004).

connections with home and as a means of “bonding” new recruits to the organization. Moreover, any children who subsequently attempted escape were harshly disciplined. Nonetheless, at some point, many such children have become willing members of the organization, either as “soldiers” or in an active “combat support” role. In short, at what point are kidnapped children no longer afforded status as protected persons and become “combatants” who can be held accountable for the capital, or other crimes?<sup>75</sup>

The International Committee of the Red Cross (“ICRC”) uses a “combat function” test to assess whether someone can be targeted. According to the ICRC, in “non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’).”<sup>76</sup> The ICRC sees the CCF test as involving a person’s integration into combat operations, to include the “preparation, execution, or command of acts or operations amounting to direct participation in hostilities,”<sup>77</sup> but excluding other persons who accompany or support the group. Here, a combat function could include carrying arms, exercising command over the group (or a sub-unit), or carrying out various operational planning, intelligence, or logistical (e.g., delivering ammunition) activities. Thus, the CCF test makes it possible for the UPDF to target LRA “family” members, to include either children or “wives,” depending upon the circumstances. In other words, family members may support the group in many different ways, including spontaneous, episodic participation in hostilities, followed by a return to domestic activities. Nonetheless, family members cannot be regarded as members of an organized armed group unless they assume a “continuous combat function.”

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75. Geneva Convention IV, *supra* note 6, art. 68 (4) provides that “the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offense.” AP II, *supra* note 7, art. 6 (4) also prohibits the imposition of the death penalty on children under age eighteen at the time of the offense.

76. Nels Melzer, *Interpretive Guidance on The Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross 16 (Feb. 2009). See also HJC 769/02 Public Committee Against Torture in Israel v. Gov’t of Israel (1999) (Isr.) (construing the application of customary international law to Israeli targeting practices against non-state actors, to include reviewing the standards for direct participation in hostilities and imposing a “heavy” burden of proof on the attacking army).

77. Melzer, *supra* note 76, at 34.

Kony and the military members of his organization probably qualify as unprivileged “belligerents” within the meaning of the Third Geneva Convention.<sup>78</sup> Article 4(a)(2) provides persuasive guidance for assessing the combatant status for members of “militias and members of other volunteer corps, including those of organized resistance movements.”<sup>79</sup> Here, Kony has firmly asserted his command over the LRA,<sup>80</sup> enforcing adherence to his own idiosyncratic code of conduct, while his men have worn uniforms and carried weapons openly, but while also consistently and openly flouting the laws and customs of war.<sup>81</sup> Indeed, Kony went to great lengths for many years to showcase his organization as a “military organization,” complete with ranks and unit structures.<sup>82</sup> This means that the UPDF can conduct status-based targeting of the LRA consistent with the principle of distinction.<sup>83</sup> Thus, a uniformed LRA

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78. Geneva Convention III, *supra* note 5, art. 4(a)(2). While this standard is applicable to international armed conflict, it does provide a useful reference for assessing the combatant status for targeting the members of an “organized armed group” in non-international armed conflict. The fact that the UPDF may make status-based targeting decisions does not necessarily mean that the LRA members also have other combatant rights, such as immunity from prosecution for killing members of the UPDF.

79. *Id.* The members of a militia, volunteer corps, or organized resistance movement must be “commanded by a person responsible for his subordinates,” have “a fixed distinctive sign recognizable at a distance,” carry arms openly, and conduct “their operations in accordance with laws and customs of war.”

80. *Evolution of LRA Command Structure*, LRA CRISIS TRACKER (2016) (last visited Feb. 18, 2015) (on file with author).

81. Kony has repeatedly demonstrated his capacity to enforce IHL, if he would choose to do so. As an example, in 2007 Kony executed his deputy Vincent Otti, apparently as a disciplinary measure. BBC NEWS AFRICA, *supra* note 64. Moreover, the LRA leaders have been known to beat, torture, and kill recently abducted child to establish discipline and exact compliance with orders. See OLOYA, *supra* note 11.

82. Under the 2005 UPDF Act, it is illegal for non-members of the armed forces to carry arms or wear military uniforms in Uganda. Section 119 (1)(h)(i) gives the military courts jurisdiction over civilians who have illegal possession of “arms, ammunition or equipment being the monopoly of the Defence Forces. . . .” Section 164 (1)(a) prohibits any person, without authority, from wearing or using “any uniform supplied, to or authorized for use by, any member of the Defence Forces.” A violation of this latter provision can result in an imprisonment term, not exceeding seven years. This is a point that is periodically raised in Ugandan press articles. See, e.g., Pat Robert Larubi, *UPDF Warns Again on Use of Military Attire*, CHIMPREPORTS (Jan. 5, 2015), <http://chimpreports.com/updf-warns-again-on-use-of-military-attire>. In short, there is unequivocal evidence that Kony claims combatant status for members of his organization. This also means that Kony and his soldiers can be prosecuted by general court martial for arms and uniform violations of the UPDF Act.

83. Geneva Convention Common Article 3 (1) provides that “[p]ersons taking no active part in the hostilities” shall be treated humanely, but the phrasing in AP II is slightly different,

member—with clear membership in the group—raises a presumption of hostility and provides the UPDF with the authority to conduct status-based targeting against such a person. The situation becomes problematic if the LRA members are not wearing uniforms, or are family members serving in a range of combat support roles. In any case, as unprivileged belligerents, Kony and his followers may not claim “prisoner of war” status and may be held accountable for all offenses under Ugandan law, as well as for any war crimes committed in violation of IHL.<sup>84</sup>

In sum, the Uganda-LRA conflict also raises important questions about the status of LRA members, a point that concerns both targeting as well as the scope of “combatant immunity” under IHL. The UPDF must conduct operations consistent with the basic principles of necessity, distinction, proportionality and humanity.<sup>85</sup> Here, the UPDF has a clear need to eliminate an armed group that poses a wide-ranging threat to civilians and military personnel, and it must do so while limiting incidental injury to civilians (namely, persons not taking part in hostilities) and avoiding or minimizing collateral damage in accordance with the principle of proportionality. While, in some cases, the UPDF can target LRA members based upon combatant status in the organization, in other cases it is limited to the standard involving direct participation in hostilities. Nonetheless, captured LRA members are not entitled to claim prisoner of war status with resulting combatant immunity.

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directing that the civilian population “shall not be the object of attack” and that [c]ivilians shall enjoy the protection of the afforded by this part, unless and for such time as they take a direct part in hostilities.” AP II, *supra* note 7, art. 13 (3). According to the ICRC, “Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.” Melzer, *supra* note 76, at 46.

84. The right to prisoner of war status is controlled by Geneva Convention III, Article 4, but that article is inapplicable to non-international armed conflict. Prisoners of war are generally entitled to “combatant immunity,” that is immunity from prosecution for lawful killings (e.g., UPDF soldiers and other government employees).

85. Melzer, *supra* note 76, at 77. The general principles regarding the protection of civilians likely reflect customary international law. *See generally* Melzer, *supra* note 76; Michael Matheson, Deputy Legal Advisor, U.S. Dep’t of State, Remarks at Sixth Annual American Red Cross-Washington College of the Law Workshop (Jan. 27, 1987).

*D. Assessment: The Scope of Combatant's Privilege*

The characterization of the conflict as non-international, as well as a finding that the LRA members are “unprivileged belligerents,” has important implications for accountability under both domestic and international criminal law. On one hand, if a non-international armed conflict has existed, Uganda can treat Kony and his followers as part of a criminal organization subject to prosecution under Ugandan criminal laws for the full range of acts, whether committed against the UPDF or civilians. Moreover, even if Common Article 3 does apply to this conflict, Uganda can still choose—as a policy matter—to prosecute LRA members for the killing of soldiers and civilians alike, or it can choose to exercise prosecutorial discretion and to exclusively charge war crimes (effectively extending “combatant’s privilege” to LRA members). On the other hand, if an international armed conflict has existed, Uganda may decide to forego prosecution for certain acts against the government while prosecuting Kony and his followers for war crimes and crimes against humanity. Also, a finding that certain offenses were committed in a non-international armed conflict limits the permissible range of charges against LRA members (i.e., Kony cannot be held accountable for “grave breaches” per se). In any case, Uganda must make a policy decision on whether, as well as for what crimes, to prosecute previously abducted children. This leads directly to the question of how Kony and his followers could be prosecuted under Ugandan law; this is a topic that has been seldom discussed in scholarly literature.

*IV. ACCOUNTABILITY UNDER UGANDAN LAW**A. Introduction: Modernizing Ugandan Law and Practice*

In theory, LRA members can be prosecuted for a range of crimes under existing national law, eliminating the need for an international court to adjudicate cases—at least to the extent that municipal courts are willing and able to do so. Uganda, since its 1962 independence from Great Britain, has experienced political instability, with periods of civil unrest and serious human rights violations.<sup>86</sup> Nonetheless, the

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86. Francis M. Ssekandi & Cos Gitta, *Protection of Fundamental Rights in the Uganda Constitution*, 26 COL. HUM. RTS. L. REV. 1919 (1994).

1995 Constitution, the third since independence, provides for an independent judiciary with significant powers. While the administration of justice in Uganda has evolved in many positive respects over the past 20 years, Ugandan law—constitutional, statutory, and decisional—has shortcomings in certain areas and the courts lack experience in complex criminal and war crimes cases. This suggests that, despite great efforts to modernize Ugandan law and practice, its courts would face important challenges in adjudicating complex, high profile cases in a fair and consistent manner that would be respected by disinterested and affected persons alike. In short, the LRA offenses are not garden-variety criminal cases, but involve a wide range of acts over a broad period of time with complex legal and evidentiary issues that the Ugandan judiciary has rarely, if ever, faced.

*B. The Administration of Justice: Courts, Statutes, & Issues*

Uganda was a British protectorate from 1892 until its independence on October 9, 1962. Subsequently, the country passed through several periods of military rule (the Idi Amin, Tito Okello, and Museveni regimes) and marked human rights abuses. Eventually, in 1987 Yoweri Museveni seized power and established a new government. The 1995 Constitution provides for the overall structure of the government and outlines a series of rights and freedoms.<sup>87</sup> The Constitution creates a legislature (the Parliament), an Executive (the President), a Cabinet that includes the Attorney General<sup>88</sup> and the Director of Public Prosecutions (DPP),<sup>89</sup> and the judiciary. On national security matters, the Constitution creates the UPDF,<sup>90</sup> the Uganda Police,<sup>91</sup> and the intelligence services.<sup>92</sup>

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87. See CONSTITUTION OF THE REPUBLIC OF UGANDA (Uganda), (Sept. 22, 1995), arts. 20-45, available at <http://www.refworld.org/docid/3ae6b5ba0.html>. The Constitution provides for a range of human rights including freedom from discrimination, right to life, protection of personal liberty, respect for human dignity, and protection from inhuman treatment, privacy, right to a fair hearing, the protection of minorities, and the right to access information.

88. *Id.* art. 119. The Attorney General serves as the principal legal adviser of the government, including representation of the government in court.

89. *Id.* art. 120. The DPP directs police investigations and criminal prosecutions.

90. *Id.* arts. 208-10. Under Article 210 (b), Parliament has the power over the “recruitment, appointment, promotion, discipline and removal of members of the Uganda Peoples’ Defence Forces and ensuring that members of the Uganda Peoples’ Defence Forces are recruiting from every district of Uganda.” No doubt, this latter provision was enacted to overcome the earlier British practice of recruiting soldiers largely from the northern districts to

The Ugandan judiciary is based upon the legacy of British rule; the English legal system, to include a hierarchy of courts that adjudicate cases based upon statute, and English common law, to include its customs and practices, has left an enduring imprint on the Ugandan judiciary that continues to the present day. The 1995 Constitution provides for courts of judicature to include a Supreme Court of Uganda, the Court of Appeal of Uganda, the High Court of Uganda, and such subordinate courts as may be established by Parliament.<sup>93</sup> In turn, Parliament has passed statutes that are applicable to a wide range of national security issues and the judiciary has decided a small body of relevant cases. Nonetheless, Uganda has nascent structure, processes, and procedures, as well as judicial experience, for addressing the complex issues in national security cases.

Uganda has several important statutes that are applicable to the range of offenses that occurred over the course of the entire conflict with the LRA, to include acts committed by either military personnel or civilians. The basic criminal law is the Penal Code Act of 1950. Article 4(2) provides for extra-territorial jurisdiction over Ugandan citizens who commit certain crimes abroad, to include treason, which includes levying war against Uganda (Article 23); offenses against the President (Article 24); concealment of treason (Article 25); terrorism (Article 26); and promoting war (Article 27), with a five year statute of limitations for offenses under Articles 23, 24, 25, and 26.<sup>94</sup> The Penal Code Act has articles on treason and terrorism that sweep broadly and are subject to abuse. A person can commit treason in different ways; some sub-sections require an overt act and other sub-sections can be violated by forming “an intention.” A person can violate the terrorism article largely through political acts that support

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ensure a “national” army. Parliament, in turn, has passed two statutes regulating the UPDF: the UPDF Act 1992 and the UPDF Act 2005. Both UPDF Acts address military justice matters, to include court martial authorities, structures, individual rights, and procedures. While the 2005 Act is more detailed and provides better coverage of the issues, there are still due process concerns with the statute that include overbroad and vague articles, the lack of a right to defense counsel in trial proceedings, the application of the statute to persons not belonging to the UPDF or “accompanying the force,” and the application of the death penalty.

91. *Id.* arts. 211-14.

92. *Id.* art. 218.

93. *Id.* art. 129.

94. *See* The Penal Code Act, *supra* note 8.



the organization, though this has been superseded by the Anti-Terrorism Act of 2002.<sup>95</sup>

Kony and the senior leaders of the LRA could be charged with a broad range of criminal offenses under Ugandan law to include treason in that they have levied war against the nation, plotted and acted to overturn the government, and aided and abetted others in doing so in violation of the Penal Code Act.<sup>96</sup> Additionally, Kony and his senior leaders have clearly been members of a terrorist organization, as defined under Ugandan law, and have committed a range of firearms offenses under Article 26(4).

In 1964 Uganda passed The Geneva Conventions Act, which essentially “domesticated” the 1949 Geneva Conventions treaties.<sup>97</sup> The Act provides that any “person, whatever his or her nationality, who commits or aids, abets or procures the commission by any other person of any grave breach,” as defined in Geneva Conventions I through IV, commits an offense and is liable to punishment for up to life imprisonment.<sup>98</sup> It is also noteworthy that the Act provides for extra-territorial (long arm) jurisdiction where “an offense under this section is committed without Uganda, a person may be proceeded against, indicted, tried and punished for that offense in any place in Uganda as if the offense had been committed in that place . . . .”<sup>99</sup> While Uganda is also a signatory to the Genocide Convention,<sup>100</sup> this treaty has not been domesticated into Ugandan law.<sup>101</sup> Contrary to emerging international practice, Uganda does still impose the death penalty for a range of offenses.<sup>102</sup>

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95. The Anti-Terrorism Act (2002) (Uganda).

96. See The Penal Code Act, *supra* note 8, art. 23.

97. See generally The Geneva Conventions Act (1964) (Uganda).

98. *Id.* art. 2.

99. *Id.*

100. See The Genocide Convention, *supra* note 21.

101. Report of the Committee on Defense and Internal Affairs on the Petition on the Lapsing of Part II of The Amnesty Act, 2000, The Republic of Uganda (Parliament), 27 (August 2013).

102. See The Penal Code Act, *supra* note 8. Uganda’s application of the death penalty has been roundly criticized over the past ten to fifteen years, in part because it had been automatically applied to a wide range of criminal offenses and in part because it is inconsistent with emerging international norms. For example, in 2005, the Constitutional Court ruled that its mandatory imposition was unconstitutional because it did not allow a trial to consider any mitigating circumstances that might make the death penalty an unduly severe punishment and did not allow a trial court any discretion in determining an appropriate sentence. *Dr. Kizza Besigye & Others v. Attorney General* (2010) UGCC 6 (Const. Petition No. 07 of 2007).

The UPDF, as indicated, is governed under a separate statutory basis.<sup>103</sup> While either the 1992 or the 2005 UPDF Act could be readily applied to a wide range of war crimes committed by soldiers, there are also limited provisions that be readily applied to Kony, his senior officers and other members of the LRA. In any case, there are important questions about the competence, independence, and impartiality of Uganda's military justice system.<sup>104</sup> Both the 1992 and the current 2005 UPDF Act fail to provide adequate structure and processes for a fair trial, as applied to either military members or civilians.

The 1992 UPDF Act proscribed a range of offenses and created a military justice system that is independent of the Ugandan judiciary.<sup>105</sup> Article 15 provides for jurisdiction over military members and certain non-members who accompany the forces or are commanded by members of the UPDF. It is noteworthy that certain civilians are also subject to military law under Article 15(i): "every person found in unlawful possession of arms, ammunition, equipment and other prescribed classified stores ordinarily being the monopoly of the army."<sup>106</sup> This article has been widely applied to militant/rebel

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103. CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87. See also Ronald Naluwairo, *Military Justice, Human Rights and the Law: An Appraisal of the Right to a Fair Trial in Uganda's Military Justice System* (Nov. 2011) (unpublished doctor of philosophy thesis, University of London). This thesis is an excellent study of Uganda's military justice system, tracing it from its historical roots to the present day, while providing a useful analysis of important issues that impact the defendant's right to a fair trial.

104. The government has, for example, claimed that it has court-martialed soldiers in the documented rape cases brought by civilians over the course of the Uganda-LRA conflict. See Wegner, *supra* note 21. But, even if one assumes that the UPDF may be able to conduct fair trials for soldiers accused of war crimes and other serious violations of international humanitarian law, this still leaves open the question of whether it would be "willing" to do so in a fair and public trial.

105. UPDF Act (1992) (Uganda). One issue that has been periodically raised involves the surprising argument that the Constitution does not even apply to the UPDF. According to one jurist: "In the course of my eleven years service as a justice of the Constitutional Court, I have heard very senior representatives of the Attorney General argue that the Constitution does not apply to the Uganda Peoples Defence Force as it applies to other authorities and persons in Uganda. They particularly like to argue that the Constitution does not apply to the military courts martial because the Courts are not Courts of Judicature within the meaning of article 129 of the Constitution." See also *Uganda Law Society & Anor v. Attorney General* (2009) UGCC 1 (Constitutional Petitions No.2 & 8 of 2002). The Constitutional Court did hold that courts martial were part of Uganda's system of justice and were subordinate to Article 128 (Independence of the judiciary) of the Uganda Constitution.

106. UPDF Act (1992), art. 15(i). Naluwairo explains that this expansion of military jurisdiction to civilians actually originated in 1973 by presidential decree from President Idi

groups throughout the country and has been the subject of much criticism.<sup>107</sup> The 1992 UPDF Act further created a system of military courts to include field court-martial,<sup>108</sup> division court-martial,<sup>109</sup> and general court-martial.<sup>110</sup> Of note, the statute also created a Court-Martial Appeal Court, but it only has jurisdiction from the decisions of a general court-martial; the statute did not provide for any other appellate rights or procedures.<sup>111</sup> The statute makes no mention of

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Amin, a dubious genesis for the modern UPDF Act. *See also* Naluwairo, *supra* note 103, at 119. *See* Ronald Naluwairo, *The Trial of Civilians in Uganda's Military Courts: Interrogating the Reasons and Constitutionality*, 19 E. AFRICAN J. OF PEACE & HUM. RTS. 383, 385 (2013) (examining some of the arguments that have been proffered as justification for military jurisdiction over civilians).

107. *See Righting Military Injustice Addressing Uganda's Unlawful Prosecutions of Civilians in Military Courts*, HUM. RTS. WATCH (July 27, 2011), <https://www.hrw.org/report/2011/07/27/righting-military-injustice/addressing-ugandas-unlawful-prosecutions-civilians> (explaining that military courts have prosecuted over 1,000 civilians during the period 2002-2011 for criminal offenses such as murder and armed robbery). *See also* John Emerson, "Get the Gun": Human Rights Violations by Uganda's National Army in Law Enforcement Operations in Karamoja Region, HUM. RTS. WATCH (Sept. 11, 2007), <https://www.hrw.org/report/2007/09/11/get-gun/human-rights-violations-ugandas-national-army-law-enforcement-operations>; Naluwairo, *supra* note 103, at 176-83 (providing a detailed analysis under international human rights law that pointed out that allowing military courts to exercise jurisdiction over civilians raises issues regarding differential treatment under two different justice systems).

108. UPDF Act (1992), art. 78. This provision has been the subject of much criticism. In 2002, two Ugandan soldiers were tried by field court martial in Karamajo for a murder and robbery that occurred only three days before, and, after a trial of less than three hours and without an opportunity for any appeal, the soldiers were executed by firing squad. This has led at least one commentator to question the due process protections (e.g., right to counsel, quality of the pre-trial investigation, and appeal rights) available to UPDF soldiers. Indeed, there is even a strong implication that senior officers had decided upon execution even before the trial began. Henry Onoria, *Soldiering and Constitutional Rights in Uganda: The Kotido Military Executions*, 9 E. AFRICAN J. OF PEACE & HUM. RTS. 87, 101 (2003). In addition, there are also important questions about the jurisdiction of a field court martial, in that field commanders may have unfettered discretion in whether to convene such a tribunal with the power to impose capital punishment, but leaving a defendant with very limited rights. Naluwairo, *supra* note 103, at 163-65.

109. UPDF Act (1992), art. 80.

110. *Id.* art. 81.

111. *Id.* arts. 84-87. The Court Martial Court of Appeal was originally constituted in the 1964 Armed Forces Act, but later became non-functional during the Idi Amin regime and thereafter. The Court was abolished with the 1986 NRA Codes of Code (Legal Notice No. 1), but was reconstituted with the UPDF Act 1992. Naluwairo, *supra* note 103, at 116-22. The UPDF Act 2005 provides that three of the five members of that Court, to include the Chairperson, shall be qualified advocates while the other two must be senior officers in the UPDF, but the statute makes no reference to their manner of appointment or tenure in office. There is no provision for the reporting of its decisions or the appeals process from that Court.

rules of procedure or evidence, the rights of an accused to retain counsel, court-martial transcripts/reports, or issues of command influence.<sup>112</sup> Needless to say, the 1992 Act left open many questions about the due process rights of service members, as well as of citizens accused of weapons offenses.

The 2005 UPDF Act is a substantial improvement on its predecessor, even though from a human rights perspective it contains some important gaps, as well as vague language subject to abuse.<sup>113</sup> In addition, there are important issues concerning the competence, independence and impartiality of the proceedings, raising concerns whether the accused will receive a fair hearing and have appellate rights.<sup>114</sup> In one improvement over the 1992 Act, the military is enjoined to observe the rules of evidence and procedure applicable in civilian courts. Article 41 provides that accused soldiers deployed abroad will be repatriated to Uganda for trial or, if the soldier must be tried outside Uganda, that Ugandan law will apply.<sup>115</sup> There are, however, Articles that risk a confusion of military and civilian law enforcement roles; this leads to questions whether the Ugandan Police or the UPDF should be responding to a situation, the appropriate use of force, and whether certain offenses should be prosecuted through civilian or military courts. For example, Articles 42 through 45

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This raises substantial questions about the independence, transparency, and impartiality of the Court. *Id.* art. 199.

112. The Court Martial Appeal Court is managed by its own regulations. As Naluwairo points out, this means that many aspects of courts processes and procedures can be changed at any time by the Defence Minister without parliamentary involvement. Naluwairo, *supra* note 103, at 166-68.

113. UPDF Act (2005).

114. See also Ronald Naluwairo, *Uganda's Military Courts and the Right to a Competent Tribunal: Some Reflections*, 5 MALAWI L. J. 161 (2011) (arguing that there are no safeguards to ensure that Uganda's military courts are competent and that appointed judicial officers have integrity); Ronald Naluwairo, *Military Courts and Human Rights: A Critical Analysis of the Compliance of Uganda's Military Justice with the Right to an Independent and Impartial Tribunal*, 12 AFRICAN HUM. RTS. L. J. 448 (2012) (arguing that Uganda's military courts lack independence and that appointed judge advocate officers lack tenure and financial security); Ronald Naluwairo, *Uganda's Civil Courts and the Administration of Military Justice: An Appraisal of their Jurisprudence on Selected Issues*, 17 LAW, DEMOCRACY & DEVELOPMENT 111 (2013) (providing an overview of Ugandan military law and analyzes key cases involving senior army officers); see generally Ronald Naluwairo, *The Trials and Tribulations of Rtd. Col. Dr. Kizza Besigye and 22 Others* (Makerere University, Human Rights & Peace Centre, Working Paper, 2006) (examining the general court martial provisions in the 2005 UPDF Act and the trial of Col. Besigye).

115. UPDF Act (2005), art. 4.

address UPDF aid to civil power, for example in response to riots or civil disturbances, and gives “officers and militants called out for service . . . all the powers and duties of a police officer.”<sup>116</sup> Article 119 (i), creating military jurisdiction over civilians charged with arms violations, is essentially the same wording as in the 1995 UPDF Act.<sup>117</sup>

Articles 120 through 184 proscribe a range of offenses. Many offenses use vague/ambiguous language and/or carry harsh sentences, particularly when one considers the lack of publicly available court-martial records and reports that could be used to guide future lawyers and researchers. In one example, under Article 122, a person “who fails to protect war materials [e.g., arms and ammunition], misuses or sells them, commits an offense and is on conviction, liable to suffer death.”<sup>118</sup> In a second example, under Article 123, a person who:

- (a) is charged with the responsibility of briefing for an operation and fails to do so;
- (b) fails to obey instructions as explained or laid down regarding a briefing for an operation; or
- (c) fails to prepare for an operation,

commits an offense and is, on conviction, where there is failure of operation or loss of life, liable to suffer death or, in any other case, liable to life imprisonment.<sup>119</sup>

Clearly, both Articles 122 and 123 could result in heavy punishment where the accused acted negligently or was not the proximate cause of the operational failure.

Articles 191 through 249 describe the operation of the military justice system to include the duties and functions of courts martial, presence of military advocates at various levels, and appellate rights

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116. *Id.* art. 43 (1). The UPDF routinely deploys units to Karamojong communities in support of civil authorities, raising a question regarding the applicability of the Geneva Conventions (a non-international armed conflict) or national law (domestic disturbances). This creates a critical issue as it applies to arms offenses under Article 119(i) of the UPDF Act.

117. *Id.* art. 119(i). This article, like its predecessor in the 1995 Act, has been the subject of continuing criticism. Umaru Kashaka, *MP calls for reforms in military court martial*, NEW VISION (July 15, 2014), <http://www.newvision.co.ug/news/657544-mps-calls-for-reforms-in-military-court-martial.html>.

118. UPDF Act (2005), art. 122.

119. UPDF Act (2005), art. 123.

and limitations.<sup>120</sup> In general terms, this is a substantial improvement on earlier law, although an accused person still lacks the right to a dedicated defense “advocate.”<sup>121</sup> Naluwairo argues that Section 201(2), which prohibits a court member from “disassociating” himself from a decision, effectively limits the use of dissents, thus impairing the independence and impartiality of judges.<sup>122</sup> Finally, the manner in which courts martial are constituted, especially with regard to appointment of serving military officers as judges, the limited use of fixed terms (one year for general court martial members) and limited requirements for legal expertise,<sup>123</sup> raises concerns about the competence, independence, and impartiality of military judges.<sup>124</sup> Not only is there a risk of bias on the part of the judges hearing the case, there is also a substantial risk of command influence and having cases/sentencing decided even before trial.

Uganda has also enacted a 2002 Anti-Terrorism Act<sup>125</sup> and a 2012 Prevention and Prohibition of Torture Act.<sup>126</sup> Both statutes provide considerably enhanced governmental authorities to investigate and prosecute a broad range of offenses. The 2002 Anti-Terrorism Act proscribes a range of terrorist acts, labels four groups

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120. The UPDF Act 2005 also recognizes two non-court martial authorities. Under Article 195, a summary trial authority can hear and decide non-capital cases and, under Article 205, a unit disciplinary committee can impose a range of punishments. Both authorities provide limited rights to defendants. Article 205 bars the presence of advocates, but allows the accused the right to demand trial by court martial. Under Article 191 (3)(a), the summary trial authority can impose a punishment of up to six months detention. Under Article 195(4), the unit disciplinary committee can impose any punishment allowed by law (without definition). In any case, these two “non-court martial authorities” lack many fair trial guarantees and are subject to abuse. *See* Naluwairo, *supra* note 103, at 154-62.

121. It is noteworthy that the field court martial still retains the power to impose the death sentence and the accused lacks any statutory appellate rights from that forum. UPDF Act (2005), art. 227. *See also* Naluwairo, *supra* note 103, at 127-28.

122. Naluwairo, *supra* note 103, at 162-63.

123. There is, for example, no requirement for the judges at the division and general court martial to be trained lawyers, only that a trained judge advocate advise each court during proceedings and deliberations. UPDF Act (2005), arts. 194, 197, 198, 202.

124. Naluwairo, *supra* note 103, at 185-200.

125. The Anti-Terrorism Act (2002) (Uganda).

126. The Prevention and Prohibition of Torture Act (2012) (Act No. 3) (Uganda). This statute effectively domesticates Uganda’s international law obligation under The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nov. 10, 1984. *Id.* Uganda’s accession to the treaty was effective on November 3, 1986. *See* Convention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984), 1465 U.N.T.S. 85, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/iv-9.en.pdf> (last visited June 14, 2015).

as terrorist organizations specifically including the LRA,<sup>127</sup> provides for enhanced investigatory authorities for the government, extra-territorial application (long-arm jurisdiction), and makes certain offenses triable and bailable only by the High Court.<sup>128</sup> This broad statute clearly drives at many of the practices used by the LRA over the past twenty-seven years to include murder, kidnapping, maiming, and attacking.<sup>129</sup>

The 2012 Torture statute should be a particularly effective tool against both eliminating abusive police/military practices and groups such as the LRA.<sup>130</sup> The statute sweeps broadly, including persons acting in an official capacity, as well as rebel/terror groups that practice torture.<sup>131</sup> On one hand, there have been frequent reports by human rights groups of police and military personnel using torture and coerced confessions, particularly within the context of treason charges, over the past decades.<sup>132</sup> The effective and even-handed implementation of this statute should go a long way to overcoming

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127. The Lord's Resistance Army, the Lord's Resistance Movement, Allied Democratic Forces, and al Qaeda. See The Anti-Terrorism Act, *supra* note 125, Second Schedule.

128. *Id.* §§ 4, 6, 17.

129. *Id.* § 7 (defining terrorism to include murder, kidnapping, maiming, and attacking). This statute became effective on June 7, 2002 and cannot be applied retroactively to earlier acts committed by the LRA under the Uganda Constitution, Article 28 (prohibiting against retroactive criminal legislation). This statute cannot, however, be used to prosecute civilians in a military court martial. See Naluwairo, *supra* note 103, at 125 (citing Uganda Law Society v. Attorney General of the Republic of Uganda (2006) UGCC 10 (Constitutional Petition No. 1)).

130. The Prevention and Prohibition of Torture Act (2012) §§ 2(1)(a), 3(2)(a)(b)(d).

131. *Id.*

132. See, e.g., Uganda v. Okot & 12 Ors. (2012) UGHC 97 (discussing that the High Court dismissed charges of treason and misprision of treason against thirteen persons who had been accused of membership in a rebel organization known as the Popular Patriotic Front; the court found that the prosecution had offered unreliable and inconsistent evidence, necessitating acquittals based upon a failure to establish a prima facie case). This kind of result raises questions about the quality of the underlying police investigation, as well as the DPP's decision to prosecute. It is also noteworthy that misprision of treason, that is a person "knowing that any person intends to commit treason and does not give information thereof with all reasonable dispatch" to the authorities, can be sentenced to life imprisonment. *Id.* (citing the Uganda Penal Code, Article 25). See *Hostile to Democracy: The Movement System and Political Repression in Uganda*, HUM. RTS. WATCH (Oct. 1999), <https://www.hrw.org/legacy/reports/1999/uganda/>. See also *Open Secret: Illegal Detention and Torture by the Joint Anti-Terrorism Task Force in Uganda*, HUM. RTS. WATCH (Apr. 2009), <https://www.hrw.org/report/2009/04/08/open-secret/illegal-detention-and-torture-joint-anti-terrorism-task-force-uganda> [hereinafter *Open Secret*, HUM. RTS. WATCH] (arguing that the Anti-Terrorism Act is overbroad and could be used against opponents of the government even when there has been no criminal activity).

public concerns about heavy-handed police practices. On the other hand, the statute could also be a very effective tool against groups such as the LRA. In fact, many of the LRA practices could be construed as torture against abducted persons (who are often subjected to beatings, forced to maim/kill others, and raped) and against the public at-large (e.g., causing the former “night commuter” problem in the Acholi districts<sup>133</sup>).

The 2000 Amnesty Act was “predicated on a general desire to bring an end to the acute and often vicious violence that had characterized Uganda as a polity since the 1960s.”<sup>134</sup> The statute was designed to encompass numerous different rebel groups that have plagued Uganda since January 1986, to include the LRA, the Allied Democratic Front (“ADF”), the West Nile Bank Front, and others. While the Act was later amended in 2006 and Part II (the amnesty provisions) was allowed to lapse briefly in 2012, the Act was in full force through May 2015.<sup>135</sup> This raises the issue of whether Kony and other senior LRA officers could claim the protections of this Act under the principle of *lex mitior* (i.e., the milder law) as a defense against prosecution for certain offenses that he may have committed while the Act was in force.

There are mixed views in Uganda regarding the propriety of the Amnesty Act, especially in terms of whether it furthers the national interests in bringing about peace, justice and national reconciliation.<sup>136</sup> This situation is complicated by the fact there is no clear distinction between combatants and non-combatants with regard to LRA membership. LRA members range on a “gray” scale from the

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133. The “night commuter” problem involving children who, fearing abduction by the LRA, would leave their villages every day to seek refuge for the night in the nearest town. Keith Morrison & Tim Sandler, *Children of war in Uganda*, DATELINE NBC (Sept. 26, 2006), [http://www.nbcnews.com/id/9006024/ns/dateline\\_nbc/t/children-war-uganda/](http://www.nbcnews.com/id/9006024/ns/dateline_nbc/t/children-war-uganda/).

134. Republic of Uganda, Report of the Committee, *supra* note 101, at 4.

135. Kasandre Sarah Kihika & Meritxell Regue, *Pursuing Accountability for Serious Crimes in Uganda’s Courts: Reflections on the Thomas Kwoyelo Case*, ICTJ BRIEFING 7 (Jan. 22, 2015) (explaining the parliamentary irregularities in the lapse/reinstatement of the law).

136. Republic of Uganda, Report of the Committee, *supra* note 101, at 12-18. *See also* Abdul Tejan-Cole, *Painful Peace—Amnesty under the Lome Peace Agreement*, 3 LAW, DEMOCRACY AND DEVELOPMENT 239, 242-43, 252 (1999) (noting the criticisms raised by the international community against the blanket amnesty that was offered to senior rebel leaders in the 1999 Lome Peace Agreement that would have ended the civil war in Sierra Leone and arguing that true peace and reconciliation cannot be achieved without addressing the rights and interests of the victims).



recently abducted children who have been forced to participate in acts, to adult members who—over a long period of time—have become intimidated and even willing participants.<sup>137</sup> Culpability is relative. On one hand, many people in northern Uganda support the Amnesty Act because they want to see an end to the drawn-out conflict; many of these people want the missing children to come home, even if it means there is some level of impunity.<sup>138</sup> In fact, the Act encourages combatants to return home and reintegrate into society, although there is evidence that the resettlement and reintegration programs could/should be better funded.<sup>139</sup> On the other hand, there are many people who believe that Kony and his followers have left such a wake of death and destruction that he and his followers should be held accountable; the critics believe that the Act promotes impunity and undermines human rights.<sup>140</sup>

One interesting case involves LRA Major General Caesar Acellam, who had been initially abducted by the LRA in 1988 and eventually captured by the UPDF in May 2012 in the Central African Republic, and granted amnesty earlier this year.<sup>141</sup> This case

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137. Hope Among, *Challenges in Prosecuting Former Child Soldiers in Uganda's International Crimes Division*, 18 E. AFRICAN J. OF PEACE & HUM. RTS. 336 (2012). This article reviews many of the important considerations that are involved in making a decision regarding the propriety of pursuing a criminal prosecution or a grant of amnesty. The author notes that many former combatants do not even know their own age, much less have a birth certificate, making it difficult to determine a person's age at the time a crime was committed; that the brainwashing that occurred had impacted the person's ability to understand the nature and extent (unlawfulness) of their actions; that the children had, in most cases, been abducted and had been forced to participate in crimes in order to survive; and that some children had been supplied with alcohol or drugs to fortify their resolve.

138. Prudence Acirokop, *A with Truth Commission for Uganda? Opportunities and Challenges*, 12 AFRICAN HUM. RTS. L. J. 417, 431 (2012). Acirokop notes that "[a]mnesty was always perceived as a vital tool in conflict resolution and in longer-term reconciliation and peace within the specific context of Northern Uganda as it resonates specific cultural understanding of justice." *Id.*

139. Republic of Uganda, Report of the Committee, *supra* note 101, at 39.

140. UN Office of the High Commissioner for Human Rights, UN Position on Uganda's Amnesty Act, Submission to the Hon. Minister of Internal Affairs, 4-10 (May 2012). This document argues that blanket amnesty is inconsistent with Uganda's obligation to prosecute international crimes, such as war crimes, crimes against humanity, and gross violations of human rights. This document also argues that the "Amnesty Act similarly contradicts Uganda's obligations arising from the Rome Statute."

141. Samuel Okiror, *Forgive and forget? Amnesty dilemma haunts Uganda*, IRIN NEWS (June 12, 2015), <http://www.irinnews.org/fr/report/101625/forgive-and-forget-amnesty-dilemma-haunts-uganda> (describing the tensions in providing amnesty to Acellam). See generally Mark Kersten, *A Rebel's Escape—An LRA Commander Tells His Story*, JUSTICE IN

illustrates the tension between encouraging amnesty, one of the few benefits that can be had by rebels in a non-international armed conflict, as a means of ending a conflict and the need for accountability. Many people might ask how Uganda can grant amnesty to such a senior officer, at one point the fourth most senior officer in the LRA, one who planned and participated in so many war crimes over a twenty-four-year period. Many people might also ask how far Uganda should go in the interests of reconciliation. This no doubt leaves the DPP with a difficult decision on whether to grant amnesty: how old was this person when abducted? What were the circumstances of his/her captivity? What acts did the person willingly commit? Unfortunately, the credible, admissible evidence may be lacking in many cases and the interests of justice may require the grant of amnesty.

In terms of international law, Uganda is party to two treaties that recognize and encourage amnesties even if neither instrument is directly applicable to the Uganda/LRA conflict. Under Article 6(5) to the 1977 Additional Protocol II,

. . . at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.<sup>142</sup>

Under the International Covenant on Civil and Political Rights, States may grant amnesty for all cases where capital punishment may be imposed.<sup>143</sup> In addition, the Ugandan Parliament has also recognized that a ban on amnesties is not part of customary international law, noting the inconsistent state practice and conflicting legal opinions.<sup>144</sup>

Uganda has enacted a 2010 ICC statute<sup>145</sup> that domesticates the Rome Statute. The ICC Act addresses issues regarding persons

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CONFLICT (July 31, 2013), <https://justiceinconflict.org/2013/07/31/a-rebels-escape-an-lra-commander-tells-his-story/>.

142. AP II, *supra* note 7, art. 6, § 5.

143. ICCPR, *supra* note 8, art. 6, § 4.

144. Republic of Uganda, Report of the Committee, *supra* note 101, at 28-29.

145. The International Criminal Court Act (2010) (Uganda). *See generally* Sarah Nouwen, The ICC's Intervention in Uganda: Which Rule of Law Does It Promote?, (University of Cambridge Legal Studies Research Paper, No. 22/2012, Aug. 2012) [hereinafter The ICC's Intervention in Uganda] (providing a useful history of the domestication of the Rome Statute into Ugandan law, to include the pressures on the Executive and Parliament).

accused of international crimes and cooperation with the ICC itself. In part, sections of this Act apply to any requests by the ICC, any enforcement of the ICC, or any investigation or sitting of the ICC, regardless of whether the action relates to a matter that “was committed before the coming into force of this Act.”<sup>146</sup> This statute provides the International Crimes Division (“ICD”) of the High Court with the jurisdiction to hear cases arising from this statute.<sup>147</sup> In addition, the ICC Act incorporates new modes of liability, such as the doctrine of command responsibility, under Ugandan law.<sup>148</sup> This statute, unlike the Ugandan Penal Code, excludes the application of the death penalty.<sup>149</sup> There have, however, been questions about the adequacy of the ICC Act, to include witness and victim protection, as well as when the DPP will apply the 2000 Amnesty Act.<sup>150</sup>

While the ICC may not recognize amnesties or traditional reconciliation practices, it may not make a difference if the Amnesty Act is applied to less culpable (less senior) LRA officers or their family members. Nonetheless, the Act should be amended to define the circumstances in which a person may qualify for amnesty. First, if there are senior officers of the LRA who will be subject to prosecution even if captured (as opposed to those who voluntarily

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146. The International Criminal Court Act, 2010, Part I, art. 1.

147. The ICD, formerly known as the War Crimes Division, sits as a bench of three judges and was established by the Uganda High Court in July 2008. The ICD has subject matter jurisdiction over “any offence relating to genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime as may be provided for under the Penal Code Act, Cap 120, The Geneva Conventions Act, Cap 363, The International Criminal Court Act, No. 11 of 2010 or under any other penal enactment.” The Republic of Uganda (The Judiciary), International Crimes Division, *available at* <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html> (last visited June 14, 2015). As of September 2011, the case of former LRA officer Thomas Kwoyelo was the first one it had heard. McNamara, *supra* note 40, at 653. Apparently, the ICD has had only a limited number of cases before it, to include the July 2010 terrorist bombing of the Ethiopian Village Restaurant in Kampala. *See generally* Omar Awadh & 10 Ors v. Attorney General, UGCC 18 (2014).

148. *See, e.g.*, The Rome Statute, *supra* note 14, at art. (a)(i) (incorporating a known or should be known standard for military commanders and other superiors); International Criminal Court Act 2010, Article 19 (a)(i). In fact, the Rome Statute incorporates the *Yamashita* standard. *See also* Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 209-11 (2000).

149. *Compare* The Rome Statute, *supra* note 14, Article 77(1) (imposing imprisonment for “no more than 30 years” or life imprisonment “by extreme gravity of the crime and individual circumstances”), *with* the ICC Act, 2010, Part II, Articles 7-9 (imposing terms of imprisonment for “life or a lesser term”).

150. McNamara, *supra* note 40, at 659.

renounced the fight by surrendering), those persons should be identified by name. Clearly, there should be a distinction between senior LRA officers culpable for planning and coercing others (i.e., have “command responsibility”) and less senior people who participate for lack of choice in the matter. Second, the Act should be clarified on whether a captured person will be allowed to qualify for amnesty. This would act as incentive for persons to surrender; such persons would have to choose whether to stay “in the bush” and risk death/trial, or surrender and claim the benefits of amnesty. Third, the government could clarify whether unnamed child soldiers (under a certain age) would be granted amnesty for previously committed crimes. Finally, the government should publicly announce a cut-off date for surrender, after which the Act would be allowed to lapse. This might prevent some persons from staying in the fight and committing continuing crimes, but then later requesting amnesty at an advantageous time.

There have been long-standing and substantial human rights complaints levied against Ugandan law enforcement agencies.<sup>151</sup> Indeed, both the Ugandan Police and the Joint Anti-Terrorism Task Force (“JATT”) have been criticized for a wide range of human rights abuses to include unlawful killings, torture, and abuses against suspects.<sup>152</sup> JATT is a joint, inter-agency organization that was formed in 1999 using personnel from the UPDF, the Uganda Police, and the intelligence organizations to combat the ADF.<sup>153</sup> JATT lacks a statutory mandate and has been under the operational control of the Chieftaincy of Military Intelligence (“CMI”).<sup>154</sup> Typically, JATT personnel operate in civilian clothes and drive unmarked cars and

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151. Brooke J. Oppenheimer, *From Arrest to Release: The Inside Story of Uganda's Penal System*, 16 IND. INT'L & COMP. L. REV. 117, 120-41 (2005) (describing the corruption, incompetence, and inefficiency in the Uganda Police, the court system, and the prison service). See also *State of Pain: Torture in Uganda*, HUM. RTS. WATCH (Mar. 2004), <https://www.hrw.org/sites/default/files/reports/uganda0304.pdf>.

152. See *Open Secret*, HUM. RTS. WATCH, *supra* note 132, at 61, 92 (referring to both the police and JATT). See generally U.S. DEP'T OF STATE, UGANDA 2013 HUMAN RIGHTS REPORT (2013), [http://photos.state.gov/libraries/adana/766947/public/uganda\\_2013\\_human\\_rights\\_report.pdf](http://photos.state.gov/libraries/adana/766947/public/uganda_2013_human_rights_report.pdf) (last visited Jan. 12, 2017) (referring to the police).

153. See *Open Secret*, HUM. RTS. WATCH, *supra* note 132. The JATT's mission has since expanded to include treason cases and other terrorist threats to Uganda. *Id.* at 20-22, 25-26.

154. According to Human Rights Watch, the government originally intended that the JATT would be under the command of the Inspector General of Police, but —when it appeared that the police could not manage the organization—it was transferred to the CMI. *Id.* at 20.

each officer uses the statutory authorities he has from his home organization/command.<sup>155</sup>

JATT has been accused of arbitrarily arresting suspected terrorists; holding suspects in lengthy pre-trial detention, often waiting months if ever to bring a suspect before a magistrate<sup>156</sup>; using ungazetted detention facilities (i.e., safe houses)<sup>157</sup>; using torture and other abusive interrogation practices; and even extrajudicial killings.<sup>158</sup> While the CMI, Brigadier James Mugira, has promised to investigate all claims of human rights abuses made against JATT,<sup>159</sup> it is unclear whether or to what extent the previously identified problems have been corrected. In fact, Human Rights Watch found no evidence that police and military personnel had been held accountable for any prior abuses.<sup>160</sup> In any case, there are substantial issues regarding the impartiality and integrity of law enforcement investigations, including confused and overlapping police and military law enforcement authorities.

Some people believe that the Ugandan Police, followed by the judiciary, is the most corrupt institution in the country.<sup>161</sup> Indeed, abusive police practices, particularly if biased towards the government, as well as excessive delays and costs in court proceedings, are conducive to corruption since people are left with few options but to buy their way out of a bad situation.<sup>162</sup> While this

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155. *Id.* In certain respects, this command arrangement is not unlike a joint federal/state task force used in the United States to investigate a major criminal incident. Nonetheless, the manner in which the JATT conducts its investigations and operations is quite different from any American counterparts.

156. CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87, art. 23(4)(b) requires that an arrested person be brought to court within 48 hours from arrest. Still, while the same article discusses persons “restricted or detained,” it imposes no similar requirement for judicial review. *See* art. 23(5). This creates an opening for abuse.

157. The 1995 Uganda Constitution proscribes the holding of prisoners in “ungazetted” places, namely unacknowledged locations that are not published in the official gazette. CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87, art. 23, § 2, art. 49, §2. While police stations are typically gazetted “legal” facilities, other places such as military barracks, “safe houses,” and offices are not. *Open Secret*, HUM. RTS. WATCH, *supra* note 132, at 13.

158. *See generally* *Open Secret*, HUM. RTS. WATCH, *supra* note 132.

159. *Id.* at 58-60.

160. *Id.* at 5.

161. *See generally* Sarah Namulondo, *Uganda Police Named Most Corrupt Institution*, INDEPENDENT (KAMPALA) (Dec. 11, 2012), <http://allafrica.com/stories/201212120304.html>.

162. On its Corruption Perceptions Index for 2014, Transparency International ranks Uganda as 142nd of the 175 countries in the world. *Corruption Perceptions Index 2014*, TRANSPARENCY INT’L (2014), available at <http://www.transparency.org/cpi2014/results>;

report, prepared jointly by the Inspectorate of Government and Makerere University, indicates that the removal of corrupt officials has been a priority for at least some senior officials and some progress has been made, the level corruption in 2012 (Uganda Police, 48%; judiciary, 24.8%) indicates that this is a deep-seated problem that requires a long-term effort.<sup>163</sup> According to Transparency International, “in spite of recent investigations and corruption trials, an effective enforcement of the laws in place is still lacking.”<sup>164</sup> Uganda’s government should place renewed emphasis on this critical shortcoming.

In conclusion, Uganda has a well-structured judiciary with a range of statutory instruments suitable for addressing an array of national security issues. Still, some instruments would be more effective for prosecuting LRA members than others. The administration of justice has, however, several important shortcomings with regard to its 2000 Amnesty Act, abusive police practices, and corruption.

### *C. Notable National Security Cases: Steps & Missteps*

Uganda’s courts have had limited, albeit evolving experience with contentious national security cases. This makes it difficult to make generalized statements about a defendant’s ability to get a fair trial in such cases. Nonetheless, several recent court cases indicate a need for caution in deciding the best means of handling high visibility cases such as the prosecution of Kony, his senior officers, and LRA members. Indeed, the ICD, as a recently established court, has had a limited caseload and has been challenged by a lack of resources.<sup>165</sup>

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see Deborah Hardoon & Finn Heinrich, *Daily Lives and Corruption: Public Opinion in East Africa*, TRANSPARENCY INT’L, App. C, 47-49 (May 10, 2012), available at [http://www.transparency.org/whatwedo/publication/daily\\_lives\\_and\\_corruption\\_east\\_africa](http://www.transparency.org/whatwedo/publication/daily_lives_and_corruption_east_africa) (finding based on a survey of 1,025 Ugandans that the police and judiciary were perceived as the two most corrupt institutions; that eighty-seven percent of those surveyed has paid a bribe; and that the police and judiciary were the top recipients of these bribes).

163. *Uganda*, TRANSPARENCY INT’L (2015), <http://www.transparency.org/country/UGA> (last visited June 23, 2015). See Deborah Hardoon & Finn Heinrich, *supra* note 162.

164. Maira Martini, *Uganda: Overview of Corruption and Anti-Corruption*, TRANSPARENCY INT’L ANTI-CORRUPTION HELP DESK, U4 Helpdesk Expert Answer No. 379, 1 (April 8, 2013), [http://www.transparency.org/files/content/corruptionqas/379\\_Uganda\\_Overview\\_of\\_corruption\\_and\\_anticorruption.pdf](http://www.transparency.org/files/content/corruptionqas/379_Uganda_Overview_of_corruption_and_anticorruption.pdf).

165. See Elise Keppler, *Justice for Serious Crimes before National Courts: Uganda’s International Crimes Division*, HUM. RTS. WATCH (Jan. 2012) at 1, 16-20, <https://www.hrw.org/report/2012/01/16/justice-serious-crimes-before-national-courts-uganda>.

The *Kwoyelo* case,<sup>166</sup> involving war crimes committed while the defendant was in the LRA, is a case of first impression in Uganda. Though the defendant was taken prisoner over ten years ago, the case is still not ready for trial and the recent decision of the Ugandan Supreme Court on constitutional issues failed to resolve several important points such as the characterization of the conflict or whether he could be charged with grave breaches. The trial against a political rival and former friend of the president, Dr. Kizza Besigye, revealed a contentious and even disrespectful relationship between the courts and the security services with serious due process implications.<sup>167</sup> The difficult procedural history of his case illustrates the problems associated with permitting the trial of civilians before military courts martial; the defendant has faced simultaneous prosecutions in geographically separated proceedings for the same underlying acts with confrontations between the Executive and the courts, resulting in unreasonable delays. And, finally, the *Awadh* case illustrates challenging legal issues and security difficulties faced by Ugandan courts in high profile terrorism cases.<sup>168</sup> In short, one could properly ask whether or to what extent Uganda's judiciary is able to decide complex, contentious cases in a timely manner.

Thomas Kwoyelo is a former LRA colonel who was captured by the UPDF in the DRC in 2005.<sup>169</sup> He was subsequently brought back to Uganda and in 2010, while at the Upper Prison, Luzira, he declared before a prison official that he was renouncing rebellion and seeking amnesty.<sup>170</sup> The Amnesty Commission, believing Kwoyelo qualified for amnesty, referred his petition to the DPP. Instead, the DPP

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hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division (reporting that defendants have lacked access to counsel, to include adequate time to prepare; that the remuneration for "state brief" (government-paid defense counsel) has been inadequate, making it difficult for a defendant to retain experienced counsel; that the practice in the Uganda judiciary of rotating staff and the lack of legal assistants increases the burden on judges; that Ugandan judges and counsel lack experience with complex criminal cases; and that Uganda lacks a witness protection program); *see also* Kihika & Regue, *supra* note 135 at 8 (recommending that Uganda provide the ICD with adequate resources to carry out its mandate and provide the accused with adequate resources to obtain a fair trial).

166. *Uganda v. Kwoyelo*, 2015 UGSC 5.

167. *See generally* Omar Awadh & 10 Others v. Attorney General, 2014 UGCC 18 (Consolidated Const. Petition Nos. 55 and 56 of 2011).

168. *Id.*

169. *Uganda v. Kwoyelo*, 2015 UGSC 5.

170. *Id.*

brought criminal charges against him under the 1964 Geneva Conventions Act, to include its grave breaches section under Article 2 of the Act, and the Uganda Penal Code.<sup>171</sup> The case was committed to trial before the ICD. Kwoyelo requested a “reference” to the Constitutional Court,<sup>172</sup> on the basis that he qualified for amnesty and that the DPP had taken discriminatory action against him by indicting him despite granting other similarly situated former LRA members amnesty.<sup>173</sup> The Constitutional Court held the Amnesty Act did not violate the nation’s international treaty obligations or diminish the prosecutorial powers of the DPP. The Constitutional Court did, however, hold that Kwoyelo had been discriminated against in violation of Article 21(1)(2) of the Uganda Constitution.<sup>174</sup> On April 11, 2012, the Attorney General appealed the case to the Ugandan Supreme Court, but the case could not be heard until March of 2014 because the court lacked a quorum.<sup>175</sup>

In a unanimous opinion by Chief Justice Bart Magunda Katureebe, the Ugandan Supreme Court carefully considered the Amnesty Act and the prosecutorial discretion of the DPP in deciding

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171. *Id.*

172. Uganda’s Constitution permits the Court of Appeal to sit as a constitutional court and hear petitions from trial courts—other than field courts martial—to decide issues of constitutional interpretation. CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87, art. 137.

173. Kwoyelo offered two examples involving officers who had been senior to him: Brigadier Kenneth Banya who was captured by the UPDF in 2004 and Brigadier Sam Kolo, the LRA’s top negotiator, who had surrendered in 2005, but the Court said that there was no evidence either had committed the same crimes as the defendant. *Uganda v. Kwoyelo*, 2015 UGSC 5.

174. *Id.* CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87, art. 21 provides: “(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. (2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability. (3) For the purposes of this article, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

175. Kihika & Regue, *supra* note 135, at 1; *see also* Anthony Wesaka & Perez Rumanzi, *The Task Ahead for Chief Justice Katureebe*, DAILY MONITOR (KAMPALA) (Mar. 6, 2015), <http://www.monitor.co.ug/News/National/task-ahead-Chief-Justice-Katureebe/688334-2643262-ftmxrsz/index.html> (noting the two-year delay in the appointment of a new Chief Justice and the impact that delay had upon the Uganda judiciary). The Constitution requires a full bench of all members when hearing appeals from decisions of the Court of Appeals. CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87, art. 131(2).



the propriety of criminal charges against the defendant.<sup>176</sup> The court then focused on eligibility for amnesty under the Act which provides:

(1) An amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by—

- (a) actual participation in combat;
- (b) collaborating with the perpetrators of the war or armed rebellion;
- (c) *committing any other crime in the furtherance of the war or armed rebellion*; or
- (d) assisting or aiding the conduct or prosecution of the war or armed rebellion.<sup>177</sup>

The key issue for the court was the meaning of subsection (c), “committing any other crime in the furtherance of the war or armed rebellion.” The Court found that the Act did not provide blanket amnesty and that the DPP had an obligation to determine whether a person seeking amnesty qualified in terms of whether his prior crimes had been committed in furtherance or in the cause of war.<sup>178</sup> The court then examined Uganda’s obligations under the Universal Declaration of Human Rights and the 1949 Geneva Conventions; here, the court found that the conflict “may be said to largely be not of an international character,”<sup>179</sup> but that it took on an international character when it spread to neighboring countries include Sudan and the DRC. The court then made a useful distinction between acts “not justified by military necessity and carried out unlawfully and wantonly,” and those acts “in furtherance of the war or rebellion.”<sup>180</sup>

Finally, the court turned to the claim of discrimination when other rebels had been granted amnesty.<sup>181</sup> Here, the court examined the Juba Agreements between the government and the LRA.<sup>182</sup> Even

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176. *See generally* Uganda v. Kwoyelo, 2015 UGSC 5.

177. Amnesty Act (2000), Part I § 2 (Uganda) 3 (emphasis added).

178. *See also* UN Position on Uganda’s Amnesty Act, *supra* note 140.

179. *See* Uganda v. Kwoyelo, 2015 UGSC 5.

180. *Id.*

181. *Id.*

182. *See* Uganda v. Kwoyelo, 2015 UGSC 5. The government and the LRA/LRM negotiated two agreements during the 2006-08 period. Initially, the parties negotiated the Agreement on Accountability and Reconciliation between the Government of the Republic of

though the agreements were never finalized, the court noted that the “substantive provisions of this agreement [contemplated] that individuals should take personal responsibility for grave breaches of the law, only that such persons should be guaranteed fair hearing before an impartial Court.”<sup>183</sup> In other words, the court was saying that LRA leaders knew that the government did not plan to grant blanket amnesty and that some persons would be prosecuted for serious offenses. Indeed, the ICD was created with this purpose in mind. The court found that the prosecution of one person for crimes committed, but not that of another for acts that may/may not have been the same, did not constitute discrimination in violation of the Constitution. Moreover, the court explained that the DPP did not have to enumerate his reasons for not granting amnesty to this defendant.

While the court was undoubtedly correct to remand the case to the ICD for trial, its analysis was flawed in several respects.<sup>184</sup> First, the Court did not examine the characterization of the conflict as either non-international or international armed conflict in any detail. The conflict began as a rebellion before morphing into a non-international armed conflict, but the LRA, as an organized armed group, has long since become a criminal (terror) organization that preys on innocent civilians. Kony has arguably abandoned his fight against Uganda, first with his 2006 move into the DRC and, after December of 2008, with his further movement west, away from Uganda. Kony likely now seeks only his own survival. And, if the group has received outside support from Sudan or has crossed through at least three foreign countries (Sudan, the DRC and the Central African Republic) that

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Uganda and the Lord’s Resistance Army, Juba, Sudan, signed on June 29, 2007. [hereinafter Juba Agreements]. This principal agreement was later followed by the Annexure to Agreement on Accountability and Reconciliation, signed on February 19, 2008. This annexure called for a commission to investigate the causes of the conflict, including the human rights violations caused by either side; to ensure that serious crimes are addressed by a special division of the Uganda High Court, as well as traditional and alternative justice mechanisms; to create a unit to investigate and prosecute cases; and to promote reparations to victims. While Kony never showed up for the final ceremony, the government elected to implement the agreement unilaterally.

183. *Uganda v. Kwoyelo*, 2015 UGSC 5.

184. This decision did, however, directly answer several of the points raised by the UN Commissioner. See UN Office of the High Commissioner for Human Rights, *supra* note 140. The Uganda Supreme Court held that the Act was not a blanket amnesty and that the DPP had prosecutorial discretion in making the distinction between more culpable persons guilty of war crimes, crimes against humanity and gross violations of human rights, and the less culpable persons who could be granted amnesty. *Uganda v. Kwoyelo*, 2015 UGSC 5.

does not necessarily mean that an international armed conflict exists. Indeed, the conflict could probably be characterized as an internationalized non-international armed conflict. Second, the court discussed the 1977 Additional Protocol II, but there is no indication that it applies to this conflict.

Next, there are serious questions about whether Kwoyelo can be charged with grave breaches under Article 147 of the Geneva Convention IV, as opposed to either violation of the Uganda Penal Code or war crimes. This will turn on what the exact offenses with which he is charged and when and where he is alleged to have committed those acts. It is conceivable that Geneva Convention IV may apply at some points in the conflict, particularly where it might be construed as international in character, but not others. Here, the court used terminology interchangeably, no doubt introducing a level of confusion into the case, sometimes referring to grave breaches, gross crimes, gross human rights violations, and serious personal crimes. Indeed, at one point the court said that the Juba Agreement “make [sic] it clear that individuals should take personal responsibility for grave breaches of the law,” but that term of art appears nowhere in the agreement.<sup>185</sup> It will matter greatly to the trial court, the DPP and the defendant what the particular terms mean and how they are used in this case. Can Kwoyelo be held accountable for “grave breaches” under either Ugandan statutory or international law? The court has failed to provide the trial court any legal or fact finding guidance on this critical issue.

The treason case against Dr. Kizza Besigye is a cautionary tale about the role of politics in the administration of justice in Uganda.<sup>186</sup> The case demonstrates that abusive and discriminatory treatment can occur when military and civilian jurisdiction is exercised simultaneously over the same acts. Dr. (Colonel) Besigye, who had been President Museveni’s physician during the 1980 through 1986 bush war to overthrow the prior government, retired from the UPDF

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185. Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, Uganda-LRA, June 29, 2007 (using alternative terms such as serious crimes, human rights violations, or serious criminal charges.)

186. See generally *Dr. Kizza Besigye & Others v. Attorney General*, 2010 UGCC 6, Const. Petition No. 07 (2007). According to Human Rights Watch, the Ugandan government has a “tendency to use the charge of treason to silence political opponents and those critical of the government.” *Open Secret*, HUM. RTS. WATCH, *supra* note 132, at 22.

in 2001.<sup>187</sup> He proceeded to become the leader of the largest opposition political party, the Forum for Democratic Change (“FDC”).<sup>188</sup> He accused the government of corruption and pushed for the end of the “movement” system of “non-party” government.<sup>189</sup>

Reportedly, President Museveni responded with threats of disciplinary proceedings and prosecution in military courts.<sup>190</sup> Dr. Besigye was then arrested on allegations of membership in the shadowy People’s Redemption Army (“PRA”) and in connection with an alleged plot to overthrow the government between the years of 2001 and 2004. He, along with several others, was charged with treason and misprision of treason. Subsequently, Dr. Besigye and his co-conspirators applied for amnesty, but the record is not clear whether the government acted on their petition. On November 16, 2005, while making bail applications at the High Court of Uganda in Uganda, the defendants were seized by an armed JATT team and taken to Luzira Maximum Security Prison near Kampala.<sup>191</sup> On November 24 at Makindye Military Barracks (in Kampala), the government then commenced a general court martial charging terrorism, rape,<sup>192</sup> and unlawful possession of a firearm. In December of 2005, despite an injunction by the High Court ordering the stay of court martial proceedings, the UPDF ignored the order and continued its proceedings.<sup>193</sup> On January 31, 2006, based upon a petition from the Uganda Law Society, the Constitutional Court held that the trial in

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187. *Profile of Main Opposition Leader Kizza Besigye*, IRIN NEWS (Feb. 15, 2006), <http://www.irinnews.org/report/58147/uganda-profile-of-main-opposition-leader-kiiza-besigye> (last visited June 17, 2015).

188. The FDC makes plain its opposition to President Museveni, his policies, and his unprecedented time in office. In that respect, Dr. Besigye is undoubtedly a lightning rod for the opposition, and the government’s actions against him have clearly served as a catalyst for protests. FORUM FOR DEMOCRATIC CHANGE, <http://www.fdcuganda.org/> (last visited June 17, 2015).

189. See Naluwairo, *supra* note 103, at 212.

190. *Id.*

191. *Besigye & Others v. Attorney General*, *supra* note 186. This incident is referred to in the dramatized court decision as the “First Court Siege.” According to Human Rights Watch, this siege and a later one conducted in March 2007, were actually conducted by the “Black Mamba Hit Squad,” a shadowy intelligence organization. *Open Secret*, HUM. RTS. WATCH, *supra* note 132, at 16.

192. The rape charge was based on a 1997 accusation. *Profile of Main Opposition Leader Kizza Besigye*, IRIN NEWS, *supra* note 187. In fact, the court that ultimately dismissed the charge did so by raising serious questions about the adequacy of the evidence, implying that the evidence could have been fabricated. Naluwairo, *supra* note 103, at 213-14, n.17.

193. Naluwairo, *supra* note 103, at 215-16.

the general court martial proceedings for the same acts violated the Uganda Constitution.<sup>194</sup> Nonetheless, the state still held the defendants at Luzira Prison.<sup>195</sup>

Eventually, the treason trial commenced in the High Court and, at the same time, the government proceeded to amend the charges from the first general court martial proceeding.<sup>196</sup> On November 9, 2006, the government then commenced a second general court martial proceeding, also at Makindye Military Barracks. Allegedly, that charge sheet contained the same or similar defects to the ones from the prior court martial proceeding that had rendered it unconstitutional in the January decision by the Constitutional Court.<sup>197</sup> Moreover, this court martial proceeding charged the defendants with an offense not clarified in the court's decision, which was not defined in 2001. Several warrants were then served on the Ugandan Prisons Service to deliver the defendants to the Constitutional Court on various days in January of 2007, but the defendants were never produced. Later, on March 1, the defendants were taken to the High Court for bail processing, but heavily armed security personnel again took control of the court.<sup>198</sup> "Scuffles" apparently ensued, but the defendants were not told why they were being re-arrested or where they would be taken. One advocate stated under oath, "[t]he security personnel simply insisted that they had

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194. *Uganda Law Society v. Attorney General*, 2006 UGCC 10 (Constitutional Petition No. 18 of 2005). This Constitutional Court case raises several interesting points about the concurrent jurisdiction of the High Court and the General Courts Martial. First, the Court indicated that the "first court siege" had contravened the Constitution and had violated the judiciary's independence. Second, the Court concluded that the general courts martial and the High Court were equivalent courts that could both assert jurisdiction over certain acts, but to do so in the same case would violate the fair hearing rights in the Constitution. Third, the Court clarified the appellate procedures, namely that cases should be appealed from the Court Martial Court of Appeals to the Court of Appeal of Uganda and then to the Supreme Court. The Court did, however, note a contrary case that held that decisions of the Court Martial Court of Appeals should be appealed to the High Court (the appellate processes are not delineated in either of the 1995 or 2005 UPDF Acts). Finally, the Court concluded that the military courts could properly try civilians for firearms offenses, but that the military courts lacked jurisdiction to try civilians under the 2002 Anti-Terrorism Act.

195. Naluwairo, *supra* note 103, at 217.

196. Besigye & Others v. Attorney General, *supra* note 186.

197. *Id.*

198. *Id.* This incident is referred to in the record as the "Second Court Siege." Apparently, this siege also resulted in the unlawful confinement of the judges and court staff for over six hours. The record also indicates that Besigye was taken that day to Bushenyi (in western Uganda) where he was charged with murder.

orders not to permit the Bailed petitioners to go out on bail as ordered by the Court.”<sup>199</sup> Later that same day, after the defendants had been turned over to the security forces, they were reportedly beaten up.

In October of 2010 the Constitutional Court held against the government on multiple points in a unanimous opinion, describing the evidence as largely not challenged and the government’s actions as an affront to the Constitution.<sup>200</sup> At this point, the court’s decision then proceeds with a two-page dramatic, even poetic, recitation from a book by another judge called “The Rape of the Temple.”<sup>201</sup> The court found that the defendants had been subjected to “humiliating, cruel and degrading treatment” that violated the Constitution, that they had been deprived of a fair hearing, and that the unprecedented acts of the State at the High Court of Uganda had interfered with the exercise of judicial power in violation of the Constitution. The court then issued a stay of all criminal proceedings in all courts and a direction to each to release the defendants; the court also indicated that the court martial proceedings, as well as the charges in the treason and murder trials, were null and void.

This case illustrates some of the difficulties faced by the defendants in contentious national security cases that are heard in Uganda’s courts. Initially, it is difficult to know whether there was actual merit to any of the criminal charges that were filed against Dr. Besigye or any of his co-defendants. What is clear is that he was charged in multiple courts on varying charges, at least some of which could not be sustained under the 1995 Constitution. Second, it appears that there was a significant, but probably unquantifiable, political component to the case. Dr. Besigye had been a former colleague of President Museveni, but has now accused his government of corruption and sought to replace him in office. Third, the government apparently committed numerous due process violations and which eventually foreclosed the government’s opportunity to have whatever evidence it did have heard before a neutral fact-finder. Finally, the security forces demonstrated a heavy-handed approach that demonstrates a lack of respect for the judiciary.

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199. Statement by Titus Kiyemba Mutale, ¶ 25; *Besigye & Others v. Attorney General*, *supra* note 186.

200. *Besigye & Others v. Attorney General*, *supra* note 186.

201. *Id.*

A further example is the terrorism case against Omar Awadh and ten co-defendants, based on the July 2010 bombing of the Ethiopian Village Restaurant in Kampala that killed at least seventy-four people who were watching the World Cup Finals.<sup>202</sup> Initially, the Inspector General of Police formed a large investigation team to include members of the Ugandan Police and JATT. After the team found that the attack had been coordinated across several countries, to include Somalia, Kenya, Tanzania, and the United Kingdom, the government sought assistance from several foreign governments and organizations. The defendants were subsequently arrested outside Uganda and, in September of 2010, were indicted before the International Crimes Division on multiple counts of terrorism, murder, and attempted murder. The defendants then filed a petition in the Constitutional Court challenging, on constitutional grounds, their arrest, detention and transfer to Uganda, their treatment while held in custody by the Rapid Response Unit<sup>203</sup> in Uganda, and the on-going criminal proceedings against them in the High Court (“ICD”). In part, the defendants alleged that they had been subjected to extraordinary rendition from Kenya (that is, the Kenyan Police did not have an arrest warrant or an extradition order), that they had been tortured in Kenya, and that they had been held in ungazetted locations and tortured in Uganda. In fact, the defendants cited the *Besigye* case as precedent for the proposition that mistreatment during detention warranted dismissal of the case.

In response, the Constitutional Court made numerous important findings.<sup>204</sup> First, the court did not accept the claims of illegal arrest, giving credit to the statements made by Ugandan Police about the transfer process that had taken place. Second, the court found that the defendants had been held in Uganda in excess of forty-eight hours before being brought before a magistrate, but that violation was

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202. Xan Rice, *Uganda bomb blasts kill at least 74*, GUARDIAN (July 12, 2010), <http://www.theguardian.com/world/2010/jul/12/uganda-kampala-bombs-explosions-attacks>; Omar Awadh & 10 Ors v. Attorney General, *supra* note 147.

203. The Rapid Response Unit is an ad hoc security organization that, along with similar government organizations, has been accused of human rights abuses. *Open Secret*, HUM. RTS. WATCH, *supra* note 132, at 15-17. See also *Violence Instead of Vigilance Torture and Illegal Detention by Uganda's Rapid Response Unit*, HUM. RTS. WATCH (Mar. 23, 2011), <https://www.hrw.org/report/2011/03/23/violence-instead-vigilance/torture-and-illegal-detention-ugandas-rapid-response>.

204. Omar Awadh & 10 Ors v. Attorney General, *supra* note 147.

insufficient to grant a stay of proceedings and could be addressed by the trial court through appropriate compensation. Third, the court distinguished the *Besigye* case as involving serious—and largely undisputed—breaches of human rights by Ugandan officials, but that the present allegations were general due process violations that had been controverted by the government. Here, the court indicated that the trial court could consider those claims on remand and, if appropriate, grant similar relief to the defendants. Fourth, it determined that the trial court could assess circumstances in which confessions were made and whether coercion had been involved. Next, the court considered—but found moot—the defense challenge to the ICD itself. Essentially, the Court concluded that the ICD had jurisdiction to hear the case because the case was assigned to a division of the High Court of Uganda. Finally, the court considered the novel issue (for Ugandan courts) of extraordinary rendition from Kenya. The court made lengthy and in-depth review of the leading US,<sup>205</sup> South African,<sup>206</sup> Zimbabwean,<sup>207</sup> and British<sup>208</sup> cases before finding that the government did not violate the Constitution in receiving the suspects from foreign States.<sup>209</sup>

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205. *Id.* (citing *Ker v. Illinois*, 119 U.S. 436 (1886)); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)).

206. *Id.* (citing *State v. Ibrahim* (1991) 2 SA 553 (holding that the court lacked jurisdiction to try a defendant who had been abducted from his home in Swaziland by South African Police)).

207. *Id.* (citing *Beahan v. State* (1992) LRC (Crim.)).

208. *Id.* (comparing *Regina v. Horseferry Road Magistrate's Court Ex Parte Bennett*, [1994] 1 AC 42 (Eng.) (allowing an appeal where the defendant had demonstrated a level of collusion between the British Metropolitan and the South African Police in kidnapping an individual and bringing back to the UK for trial) with *Regina v. Nicholas Robert Neil Mullen*, [1999] EWCA (Crim.) 278 (Eng.) (the Court of Appeal overturned a conviction where the British Secret Intelligence Service “took active steps to persuade the Zimbabwe Central Intelligence Organization (CIO) that there existed grounds for deportation and provided evidence including, crucially, evidence of previous convictions, as well as draft documents recommending grounds for deportation,” all in an effort to evade domestic and international law)).

209. *Id.* The court noted that any alleged illegalities occurred abroad, without any active Ugandan involvement, and that the Ugandan authorities did not violate any foreign states' sovereignty; all actions had occurred with the full cooperation of the governments of Kenya and Tanzania. Thus, the court would not consider any allegations of improprieties that may have occurred before the suspects were transferred to the Ugandan authorities.



*D. Traditional Acholi Reconciliation Practices: Necessary but Not Sufficient*

Uganda has, as part of the Juba Agreements, implemented various traditional reconciliation tribunals in the Acholi-populated areas of northern Uganda.<sup>210</sup> In practice, truth and reconciliation commissions have had a “restorative value” in bringing the former warring parties back together in a traditional forum—consistent with local cultural practice—that involves some truth telling, an acknowledgement of wrongdoing, and the payment of some compensation.<sup>211</sup> Typically, the accused receives some level of minor punishment, if the local community believes that he was truthful, but more serious punishment if he was not. Indeed, the promotion of traditional cultural norms can help foster a legitimate settlement and peace from the viewpoint of the former belligerents and their victims.

While Acholi reconciliation practices have helped, to some extent, the victimized peoples recover from the effects of war and return to a normal life, such practices raise several important problems when applied to a murderer/rapist and his victims. Some have argued that “[l]egal measures of impunity provided by various laws and constitutions under the guise of amnesties, pardons, and truth and reconciliation commissions are not recognized under the Rome Statute.”<sup>212</sup> On the other hand, the Rome Statute does not exclude traditional practices. Instead, the statute focuses on whether the “case is being investigated or prosecuted by a State which has

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210. Juba Agreements, *supra* note 182. See also Acirokop, *supra* note 138 (examining the challenges and opportunities for a Truth and Reconciliation Commission in addressing the Uganda-LRA conflict, including issues involving concurrent prosecutions, amnesty, and reparations).

211. Barney Afako, Reconciliation and Justice: ‘Mato Oput’ and the Amnesty Act, *Accord Northern Uganda*, Conciliation Resources, 64 *Accord* 11 64-67, (200), [http://www.c-r.org/downloads/Accord%2011\\_13Reconciliation%20and%20justice\\_2002\\_ENG.pdf](http://www.c-r.org/downloads/Accord%2011_13Reconciliation%20and%20justice_2002_ENG.pdf). The mato oput (the “drinking of the bitter root”) is a traditional practice that has been used to address situations in which someone has been killed, either accidentally or intentionally. In addition, ICC Prosecutor Louis Moreno-Ocampo has accepted that traditional mechanisms can work together with prosecutions, but has not been willing to accept such an alternative for the five persons then under ICC indictment. See also Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 *VA. J. INT’L. L.* 108, 143 (2009) (citing a 2007 interview Moreno-Ocampo gave to THE NEW VISION (Kampala)).

212. Betty Kaari Murungi, *Implementing the International Criminal Court Statute in Africa: Some Reflections*, 7 *E. AFRICAN J. OF PEACE & HUM. RTS* 136, 140 (2001).

jurisdiction over, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>213</sup> This language does not mandate a western-style criminal law proceeding; it is ambiguous language that allows for wide latitude in state-level discretion in whether to prosecute (what the evidence supports), the forum selected, the processes, and in the post-trial punishments that are meted out. Arguably, if Uganda were to apply amnesty or reconciliation practices, with minor punishments or bare reparations, to a senior LRA officer who had “command responsibility” and who had directed the activities of others, the ICC could infer that Uganda was “unwilling” to carry out a genuine investigation and/or proceeding.

A tiered process could address this issue.<sup>214</sup> The more senior and more culpable LRA officers who were responsible for planning and directing large-scale offenses should be held accountable in more stringent proceedings, either involving the ICD or an international tribunal, that carry heavier punishments. Truth and reconciliation practices are probably better restricted to the more numerous and less culpable LRA “soldiers” and family members who carried out the orders of more senior officers, especially if their crimes were committed as children shortly after abduction or while under coercion.<sup>215</sup> In that sense, a truth and reconciliation commission could serve several important Acholi interests; it helps reunite missing children with their families, helping both the family to understand what happened and the former child soldier to reintegrate into his community. It could dispense with more formal legal proceedings

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213. Rome Statute, *supra* note 14, art. 17(1)(a).

214. See Michael A. Newton, *A Synthesis of Community Based Justice and Complementarity* 35 (VAND. U. L. SCH., Working Paper No. 12-22, 2015) (arguing the International Criminal Court should “develop a framework for understanding community-based mechanisms in light of the ‘interests of justice’ analysis under [Rome Statute] Article 53”). In other words, the Court cannot simply impose its own preferences and override local alternative justice mechanisms.

215. See also Abdul Tejan-Cole, *The Special Court for Sierra Leone: Conceptual Concerns and Alternatives*, 1 AFRICAN HUM. RTS. L. J. 107, 117-18 (2001) (explaining the moral dilemmas involved in prosecuting child combatants before the then proposed Special Court for Sierra Leone and suggesting alternatives such as truth and reconciliation commissions with rehabilitative efforts or trials that do not result in a custodial sentence). No child was actually tried before the Special Court, as its statutory mandate was to try those “most responsible” for the offenses suffered. That limited the Court’s jurisdiction to executives, not executors.

involving both time and expense for people who are less morally culpable.

*E. Assessment: Willing, But Unable without Support*

Uganda has clearly evidenced a willingness to address the culpability of LRA members through diverse legal instruments, to include prosecution before its courts, amnesty within certain bounds, and traditional reconciliation practices. Each instrument has potential value, if one examines the culpability of the person concerned and the adequacy of the relevant processes. Nonetheless, the Ugandan judiciary may be unable to prosecute the complex criminal cases involving war crimes and crimes against humanity against senior LRA leaders without significant outside support. Uganda has lingering problems with its judiciary, with the applicable criminal statutes, and in its administration of justice.

Uganda has an effective civilian judicial structure, to include new legal instruments and institutions (e.g., the ICD), with a judiciary that is developing the requisite expertise to handle such cases. Still, the judiciary has been plagued by problems with staffing, insufficient resources, allegations of corruption, and periodic political interference. Uganda lacks a witness protection program.<sup>216</sup> On one hand, it would be a challenge to hold high profile LRA trials in a location where witnesses and the public could view the proceedings, without excessive interference from the Ugandan security services. On the other hand, it would also be a challenge to try cases against government officials and UPDF members without outside interference and threats against court personnel and witnesses. This raises concerns about the supremacy of the law and accountability in Uganda.

Uganda has at least three important statutes that could be applied to many, if not most offenses committed by the senior LRA leaders. The leaders could be charged under the Penal Code of 1950, the Geneva Conventions Act of 1964, or the UPDF Acts (for arms and uniform violations only). While Uganda has passed several further statutes that would be effective against terrorists and terror groups, to include the 2002 Anti-Terrorism Statute, the 2010 ICC Act, and the

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216. Memorandum from Gadeir Abbas, The Public International Law Group (Nov. 23, 2008) (on file with author).

2012 Prevention and Prohibition of Torture Act, the application of these statutes to many of the offenses committed by the LRA leaders would raise problems involving the prohibition against retroactive criminal laws under the Ugandan Constitution.<sup>217</sup> Still, many persons could be charged under the treason, terrorism, murder, and rape articles of the 1950 Penal Code, especially since the “grave breaches” sections of the 1964 Geneva Conventions Act probably do not apply to this conflict.

Uganda has several issues with its administration of justice, raising concerns that a defendant might not receive a fair trial. First, Uganda should reconsider its use of the treason and misprision of treason articles in its 1950 Penal Code. Both articles raise concerns, if not on the statutory language itself, at least as applied to certain defendants. The DPP should demand a timely and effective investigation by the Ugandan Police before proceeding to indict or prosecute a defendant. Treason charges should never be a cudgel to use against political opponents. Second, Uganda should repeal those sections of the UPDF Act that permit the court martial of civilians for offenses such as the illegal possession of weapons and uniforms. Civilians should not be subject to criminal trials in military courts, much less be faced with simultaneous prosecutions in military and civilian courts, at least absent truly unusual circumstances. In any case, there are serious questions about whether an accused person can receive a fair trial in a court martial and whether that court functions independent of the chain of command. Third, Uganda should amend the Amnesty Act to make clear whether the protections offered are a discretionary grant, or if their receipt is automatic once certain qualification criteria are met. This would help avoid situations like that of LRA Major General Acellam where there was a three-year delay in making this decision, with much political controversy in the interim.

Finally, and probably most important, there should be a stricter separation between the executive branch and the judiciary. This should be a cooperative relationship, with strict compliance with the rule of law. Moreover, the Ugandan Parliament should establish

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217. There are, however, several views on whether the ICC Act could have retroactive application to LRA members. Nouwen, *supra* note 145, at 15-17 (making a distinction between ‘act’ and ‘offence,’ but noting that this issue should be addressed using constitutional procedures, first in Parliament and then in the courts).

greater oversight over the executive services and agencies conducting law enforcement investigations; each service and agency should have clear authorities and limitations. This should help reduce overlap and improve effectiveness, and should help prevent human rights abuses. Ugandan judges require dedicated, qualified staff, not subject to periodic rotation between different departments. In any case, while Uganda may be currently unable to try complex, contentious cases, outside assistance could help Uganda develop this capability.

## *V. ACCOUNTABILITY UNDER INTERNATIONAL CRIMINAL LAW*

### *A. Introduction: Addressing the Scope of the Conflict*

Uganda has several alternative means of proceeding against Kony, his senior officers, and other members of his group, and each approach has its own advantages and liabilities. First, the direct prosecution under the national penal code offers wide coverage, at the cost of a large number of defendants and a significant burden on the judicial system. LRA members could be prosecuted under the Uganda Penal Code for a range of ordinary crimes, to include treason, misprision of treason, murder, kidnapping, assault, theft, defilement of a girl under age eighteen, and rape, as well as arms and uniform offenses under the 1992 and 1995 UPDF Acts. The Ugandan courts of judicature have considerable experience in prosecuting and sentencing defendants, although not at the scale and breadth seen in the Uganda-LRA conflict. Such prosecutions could reach the entire range of offenses committed by Kony and his associates with no *ex post facto* problems. Second, the use of the ICC reduces the number of offenses, especially since the Rome Statute only reaches offenses committed after July 2002, while reducing the load on the national courts. Third, Uganda could consider a new alternative, one involving a combined ICC-Uganda tribunal that could assist with the further development of the Ugandan courts as a fair and impartial court with the capacity to address complex cases. A combined tribunal could limit the number of cases if the agreement limits jurisdiction, but if not, the tribunal could simply augment the ability of the existing court system to handle the increased number of cases. Each approach has political and legal advantages, disadvantages, and costs.

The ICC has undoubtedly had a salutary effect on the administration of justice in Uganda over the past ten years. There is ample evidence that the outstanding indictments against Kony and his

senior leaders have caused Museveni's government to adopt a range of new legal instruments (e.g., the 2010 ICC Act and the 2012 Prevention and Prohibition of Torture Act) and to create new institutions (e.g., the ICD) that could provide some level of "complementarity" in Uganda law and allow the government to sidestep the ICC itself. While such a result might persuade some senior LRA leaders to surrender, it also raises questions about the adequacy of Ugandan law and its commitment to accountability. In any case, President Museveni—despite some misgivings—has accepted the fact that the ICC will now be proceeding with the case against Dominic Ongwen.<sup>218</sup> This leads to the question whether the ICC itself is the appropriate forum for addressing the range of depredations committed over the course of this conflict. For a number of reasons, it is not.

The ICC lacks the temporal and subject matter jurisdiction to cover the scope of offenses committed by either the LRA or the UPDF over the course of the entire conflict. First, the ICC lacks temporal jurisdiction for any crimes committed before July 1, 2002. This means that the court could not prosecute Kony, Odhiambo, or Ongwen for the full range of offenses for the prior ten to fifteen-year period when the LRA operated with impunity over much of northern Uganda and southern Sudan, terrorizing, mutilating, killing, abducting, and raping tens of thousands of innocent people. Second, the court's jurisdiction is narrowly focused on genocide, crimes against humanity, war crimes, and the crime of aggression,<sup>219</sup> and Kony and his co-defendants have been charged with only crimes against humanity and war crimes.<sup>220</sup> Yet, the defendants can be prosecuted for a much broader range of acts under the Uganda Penal

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218. Compare Frederic Musisi, Museveni to ICC: We are on Same Side, DAILY MONITOR (Kampala) (Mar. 4, 2015), <http://www.monitor.co.ug/News/National/Museveni-to-ICC--We-are-on-same-side/-/688334/2641672/-/85qqoy/-/index.html>, with Museveni Turns from ICC Admirer to Critic, OBSERVER (Kampala) (June 9, 2013), <http://observer.ug/component/content/article?id=25783:museveni-turns-from-icc-admirer-to-critic>. Kofi Annan, the Secretary General from 1997-2006, recognized that many Africans feel targeted by the ICC, but that the concern was misplaced. As he "tried to make clear at the 2010 review conference in Kampala, which added a definition of aggression to the statute, the ICC is simply needed more in Africa because of the weaknesses of its judicial systems. As these systems strengthen, there will be less need for the ICC." KOFI ANNAN, INTERVENTIONS: A LIFE IN WAR AND PEACE 154 (2012).

219. See Rome Statute, *supra* note 14.

220. See Prosecutor v. Kony, *supra* note 31.

Code to include treason, rape, kidnapping, terrorism, illegal possession of weapons and equipment, and inciting violence that would go unprosecuted if the ICC is the court-of-choice.<sup>221</sup> Ugandan courts can prosecute the full range of acts, whether committed in Uganda or neighboring countries.<sup>222</sup>

To balance properly the strengths and weaknesses of both the national courts and an ICC prosecution, the ICC should adopt a bilateral approach, combining lessons learned from both the International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone (“SCSL”). The ICC should establish a bilateral ICC-Uganda tribunal, perhaps in Arusha, Tanzania, but based upon Ugandan criminal law and appellate processes. The ICC should establish this tribunal through an international agreement (treaty) with Uganda which provides the court with the subject matter, temporal, and *in personam* jurisdiction for all criminal acts, war crimes, and crimes against humanity from January 1, 1990 to the present and continuing. This tribunal should have jurisdiction over offenses committed by either the LRA or the UPDF/Ugandan Police, committed in Uganda, southern Sudan, the DRC, or the CAR. Such an approach can make effective use of the pre-trial work completed by the ICC and its investigators over the past years, while promoting the rule of law in Uganda and furthering the work of the ICC to ensure accountability for persons culpable of serious crimes against international law. In any event, the treaty should name the persons who will be tried by this tribunal and explicitly recognize Uganda’s right to grant amnesty or prosecute any other LRA defendants.<sup>223</sup> In

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221. *See generally* Penal Code Act, *supra* note 8.

222. Uganda has a limited ability to assert personal jurisdiction over crimes committed in southern Sudan, the DRC, and the CAR. *Compare* the Penal Code Act, *supra* note 8, Article 4 (granting extra-territorial jurisdiction for only certain offenses) and Article 5 (granting extra-territorial jurisdiction for acts partly within and without Uganda), *with* The Geneva Conventions Act 1964, *supra* note 97 (providing for more expansive extra-territorial application for grave breaches).

223. The Constitution of Uganda recognizes the common law right to the writ of habeas corpus; the writ provides amnestied persons with a means for challenging subsequent criminal proceedings for those same acts. CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87, art. 23, § 9. Since there is a potential for a conflict between domestic and international law on the validity of amnesty as a bar to subsequent prosecution for violations of international humanitarian law, this issue should be explicitly addressed in any ICC-Ugandan agreement. While the agreement should name the defendants who would be tried by this combined tribunal, the agreement should also allow the parties to add after-discovered malefactors. The 2015 decision of the Constitutional Court in *Kwoyelo* case suggests that the application of the

overall terms, this approach would legitimize the role and work of the ICC to date, both in the international community and Uganda, and would facilitate capacity-building in the Uganda judiciary.<sup>224</sup> This approach would serve the object and purpose of the Rome Statute itself; this court would help end the impunity for the perpetrators of serious crimes and contribute to the prevention of such crimes through effective national prosecutions.<sup>225</sup>

This recommended approach also requires a policy decision from Uganda. In a certain sense, there is a political advantage in proceeding with the prosecutions in the ICC. On one hand, Museveni made the first state referral to the ICC and there could be international political costs associated with trying to withdraw that action—especially since there is no provision in the Rome Statute that addresses the issue. For domestic political reasons, Museveni may also prefer that the ICC carry the burden of prosecuting a sensitive case that could well cause many people to question his own government's conduct over that same period of time. On the other hand, Uganda made the referral over ten years ago and there have since been many positive, material developments in Uganda's administration of justice. Museveni may prefer a combined tribunal that increases the involvement of Africans in ICC prosecutions and showcases his government's ability to address the issues. Finally, while Uganda may choose—consistent with the ICCPR—to apply the death penalty to a range of ordinary criminal offenses under its own law,<sup>226</sup> it would undoubtedly have to agree to its non-application to any cases withdrawn from the ICC.

### *B. The Rome Statute and the International Criminal Court*

The ICC, with its founding Rome Statute, has offered a major advance in international criminal law, permitting the international community to move forward from the ad hoc tribunals that were

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combatant's privilege to this conflict would provide a useful means for addressing this possible conflict of laws, while still allowing prosecution for serious violations of international humanitarian law. See *Uganda v. Kwoyelo*, 2015 UGSC 5 (Const. App. No. 01 of 2012).

224. See *Uganda v. Kwoyelo*, 2015 UGSC 5 (Const. App. No. 01 of 2012).

225. See Rome Statute, *supra* note 14, pmbl.

226. Compare ICCPR, *supra* note 8 (permitting the application of the death penalty), with the Second Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 8 (seeking to outlaw that penalty).



formed to provide justice and accountability for the atrocities committed in a particular conflict.<sup>227</sup> While the international community has formed various tribunals since the end of World War II, the tribunals have been subjected to a range of criticisms as “a victor’s justice,”<sup>228</sup> as lacking of body of consistent and acceptable jurisprudence, or as requiring lengthy negotiations with political compromises. In that sense, the ICC has offered an opportunity to overcome “tribunal fatigue”<sup>229</sup> with a permanent court that offers a neutral forum that can adjudicate well-defined and serious offenses through established practices and procedures. Indeed, the Preamble recognizes that “grave crimes threaten the peace, security and well-being of the world,” and notes that the most serious crimes should not go unpunished and that effective prosecution must be ensured.<sup>230</sup> The Rome Statute entered into force on July 1, 2002. Clearly, the ICC has important features that limit its ability to address the Uganda-LRA conflict.

The ICC is a permanent institution with “international legal personality.”<sup>231</sup> It was established at the Hague and has the authority to “sit elsewhere, whenever it considers it desirable.”<sup>232</sup> Indeed, this article likely provides the ICC with legal authority to enter into some bilateral agreements, not otherwise inconsistent with the Statute, with a state party regarding the investigation and prosecution of cases that

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227. See RICHARD J. GOLDSTONE AND ADAM M. SMITH, *INTERNATIONAL JUDICIAL INSTITUTIONS* 129-33 (Thomas G. Weiss & Rorden Wilkinson eds., Routledge 2009).

228. *Id.* at 3. In one important respect, that involving the definition of certain crimes against the international community, the ICC and its founding Rome Statute offers a major advance in international criminal law. Indeed, one criticism going back the Nuremberg trials was that, consistent with the ex post facto principle, individuals should not be held criminally liable for certain acts that had not been previously proscribed. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 580-83 (1992).

229. DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 168 (2012).

230. Rome Statute, *supra* note 14, pmbl.

231. *Id.* art. 4(1), provides: “The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.” Indeed, the bilateral international agreement between the UN and the Government of Sierra Leone provides a certain precedent for a treaty between an international organization and a sovereign government. See *generally* Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138.

232. Rome Statute, *supra* note 14, art. 3(3).

would otherwise be within its jurisdiction.<sup>233</sup> The Rome Statute gives the Court jurisdiction “for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdiction.”<sup>234</sup> The Statute recognizes this principle of “complementarity,” the principle that a State’s domestic courts are accorded primary jurisdiction for prosecuting individuals, unless the ICC determines that the State is “unwilling or unable genuinely to carry out the prosecution.”<sup>235</sup> The Statute gives the court jurisdiction over just four crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>236</sup> The Statute limits the range of applicable punishments to a term of years, not to exceed a maximum thirty, or life imprisonment; the Statute excludes the application of the death penalty.<sup>237</sup>

This structured approach offers several important advantages for criminal prosecutions. First, it concentrates international attention and resources on the persons responsible for the most serious and politically sensitive international offenses. This permits the court to develop the body of law that will be most useful to the international community. Second, it encourages States to investigate and prosecute offenses wherever possible. This facilitates improved state capacity by encouraging States to handle cases through its own systems and processes, avoiding international involvement. In short, a State can know that if investigates and prosecutes cases in a good faith manner it can avoid excessive international attention. Third, the complementarity principle does not dictate any standards for the investigation, prosecution and sentencing of culpable persons; the Statute gives States great flexibility in their administration of justice.

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233. *Id.* arts. 4(1)-(2). On the other hand, if the proposed agreement were considered a significant departure from the Court’s authorities under the Rome Statute, it might be obligated to seek an amendment to the statute through an Assembly of States Parties or at a Review Conference. *See id.* art. 121(3).

234. *Id.* art. 1.

235. *See id.* art. 17(1)(a); William W. Burke-White and Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, U. PA. L. SCH. PUB. L. & LEGAL THEORY RES. PAPER SERIES, Res. Paper No. 08-13, at 38 (reviewing the legal basis for a possible Ugandan challenge to admissibility to include issues involving state referrals). Indeed, one object and purpose of the Rome Statute “is to create a court of complementary jurisdiction that preferences national prosecutions where they are possible.”

236. Rome Statute, *supra* note 14, art. 5.

237. *See id.* art. 77(1).

Here, Kony, Vincent Otti, Okot Odhiambo, Raska Lakwena, and Dominic Ongwen were indicted by the ICC with crimes against humanity and war crimes.<sup>238</sup> In terms of crimes against humanity, the LRA could undoubtedly be charged with acts of murder, enslavement, torture, and rape “as part of a systematic attack directed against any civilian population, with knowledge of the attack.”<sup>239</sup> In terms of war crimes, the LRA can be charged with “grave breaches” of the 1949 Geneva Conventions—if certain parts of the conflict were determined to be international in nature,<sup>240</sup> serious violations of the “laws and customs applicable in international armed conflict,”<sup>241</sup> or other specified offenses in armed conflicts “not of an international character.”<sup>242</sup> While Article 8(2)(c) tracks the language of Common Article 3 from the 1949 Geneva Conventions, Article 8(2)(e) expands the list of offenses to proscribe “directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”; attacks against activities and personnel using the distinctive emblems of the Geneva Conventions; attacks against activities and personnel involved in a “humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations”<sup>243</sup>; intentionally directing attacks against certain protected places<sup>244</sup>; and “conscripting or enlisting children under the age of fifteen years into the armed forces or groups or using them to participate actively in hostilities.” There is little doubt that Kony has committed a range of acts that could be construed as criminal offenses under either the Ugandan Penal Code or the Rome Statute.

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238. *See generally* Prosecutor v. Kony, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 7 September 2005 (Sept. 27, 2005); Prosecutor v. Kony, Case No. ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti (July 8, 2005); Prosecutor v. Kony, Case No. ICC-02/04-01/05-7, Warrant of Arrest for Raska Lakwena Issued (July 8, 2005); Prosecutor v. Kony, Case No. ICC-02/04-01/05/56, Warrant of Arrest for Okot Odhiambo (July 8, 2005); Prosecutor v. Kony, Case No. ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen (July 8, 2005).

239. Rome Statute, *supra* note 14, art. 7(1).

240. *Id.* art. 8(2)(a).

241. *Id.* art. 8(2)(b).

242. *Id.* art. 8(2)(c).

243. *Id.* art. 8(2)(e)(iii). *See e.g., Armed Group Kills 8 UN Peacekeepers in Garamba Park*, *supra* note 71 (reporting an armed group killing eight UN peacekeepers during an ambush in the Congo).

244. *Id.* art. 8(2)(e)(iv). *See Poaching Onslaught in Garamba National Park*, *supra* note 43.

The court has already completed many important actions since Uganda made its state referral in December of 2003. The court has completed extensive field work, both investigating the offenses and in educating the affected populations about its work.<sup>245</sup> The court has issued and then unsealed arrest warrants, ordered the submission of additional information,<sup>246</sup> initiated proceedings under Article 19 (a challenge to admissibility)<sup>247</sup> and the appointment of defense counsel,<sup>248</sup> decided issues involving the participation of victims in the case,<sup>249</sup> severed the proceedings against Ongwen, and set that matter for trial.<sup>250</sup>

In March of 2008, the Pre-Trial Chamber initiated proceedings under Article 19(1), appointing an attorney for the defense for purposes of the proceedings and inviting the parties “to submit their observations on the Admissibility to the Case.”<sup>251</sup> At this point, the defense raised questions about the propriety of the proceedings, as well as its representation of the defendants, who were still at large and

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245. See Rep. of the Int’l Criminal Court to the UN Gen. Assembly, Oct. 17, 2006, ICC-ASP/5/15 [hereinafter Rep. of the ICC].

246. Prosecutor v. Kony, Case No. ICC-02/04-01/05-131, Order to the Prosecutor for the Submission of Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda (Nov. 30, 2006).

247. Prosecutor v. Kony, Case No. ICC-02/04-01/05-377, Decision on the admissibility of the case under Article 19(1) of the Statute (Mar. 10, 2009).

248. Prosecutor v. Kony, Case No. ICC-02/04-01/05-320, Decision Initiating Proceedings Under Article 19, Requesting Observations and Appointing Counsel for the Defense (Oct. 21, 2008).

249. Prosecutor v. Kony, Case No. ICC-02/04-01/05-324 OA2, Decision on the Participation of Victims in the Appeal (Oct. 27, 2008) (addressing issues relating to the status of victims and the right to participate in the proceedings).

250. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision Severing the Case Against Dominic Ongwen (Feb. 6, 2015) (noting that severance was appropriate given that “there is no real prospect that the other suspects will appear nor certainty that they will be apprehended in the near future,” and that the present case—against a defendant who voluntarily appeared in court—should not be delayed). See also Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. INT’L HUM. RTS. 1, 13-15 (2009) (discussing issues relating to the right to be tried without undue delay under the ICCPR and before international criminal tribunals).

251. Prosecutor v. Kony, Case No. ICC-02/04-01/05-408, Decision on the Admissibility of the Case Under Article 19(1) of the Statute (Mar. 10, 2009). Under Article 19(1), the “Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.” Rome Statute, *supra* note 14, art. 19(1).

unable to participate in the matter.<sup>252</sup> The Government of Uganda regarded the case as admissible.<sup>253</sup> The Office of Public Counsel for the Victims (“OPCV”) argued that the proceedings were premature, indicating that it would be difficult to assess Uganda’s “willingness” to proceed against the defendants given the pending peace agreement and the creation of the planned legal/judicial machinery.<sup>254</sup> In its March of 2009 decision on the admissibility of the case, the Pre-Trial Chamber II made several important findings, to include the fact that the defendants, as well as other parties, would have the right to raise admissibility challenges at later dates.<sup>255</sup> While the Chamber noted the pending peace agreement, with the implementation provisions, it held “that it would be premature and therefore inappropriate to assess the features envisaged for the Special Division and its legal framework.”<sup>256</sup> This initial decision on admissibility was then appealed by the defense and the matter was decided by the Appeals Chamber.<sup>257</sup>

The ICC has two important articles that bear on the admissibility of a case. Initially, Article 17 creates complementarity rules for the admissibility of a case before the court and Article 53 allows the prosecutor to reconsider admissibility after initiating an investigation and prosecution. Article 17 does not impose specific legal requirements on Uganda; instead, it focuses on a State’s “willingness” to try a particular case, suggesting that a State could make good faith determinations on whether and to what extent a particular person

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252. *See* Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision on the Admissibility of the Case Under Article 19(1) of the Statute (Mar. 10, 2009), at para. 6-7.

253. *See id.* para. 8.

254. *Id.* para. 9.

255. *Id.* para. 25-29 (citing the Rome Statute, *supra* note 14, Articles 18(7) and 19(2). Indeed, Article 18(7) envisions that Uganda could, later, challenge the admissibility of the case “on the grounds of additional significant facts or significant change in circumstances.” Rome Statute, *supra* note 14, at Article 18(7).

256. Prosecutor v. Kony, Case No. ICC-02/04-01/05-408, Decision on the Admissibility of the Case Under Article 19(1) of the Statute (Mar. 10, 2009), at para. 51.

257. Prosecutor v. Kony, Case No. ICC-02/04-01/05 OA 3, Judgment on the Appeal of the Defense against the “Decision on the admissibility of the case under Article 19(1) of the Statute” (Sept. 16, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_06675.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_06675.PDF). The Court noted that the role of defense counsel is limited at this stage in the proceedings and “must be understood differently from the mandate of defense counsel who has been appointed to represent a person as an individual.” *Id.* para. 1.

should be tried for certain offenses and not others.<sup>258</sup> Article 53(4) provides: “The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.”<sup>259</sup> Thus, while it may have been true that Uganda could not have previously investigated the LRA cases because of shortcomings in the Ugandan Police and with JATT or could not have prosecuted the cases based on the lack of an adequate (specialized) court, the ICC is now in a position to reconsider the original admissibility decision and consider a new approach that might offer better prospects for accountability under both international humanitarian and Ugandan law. In short, the existence and activity of the ICC to date is not an *ipso facto* bar to the creation of a combined tribunal.

There are important findings that can be made with the ICC’s current approach to the prosecution of senior LRA officers. First, as noted earlier, the ICC’s limited temporal and subject matter jurisdiction is insufficient to address the totality of acts committed by the LRA. Second, the court has completed exemplary work in investigating the cases and initiating the proceedings against the most culpable LRA leaders.<sup>260</sup> It is unlikely that Uganda could have achieved such commendable results over the same period of time. Third, while it was undoubtedly once true that Uganda was “unwilling or unable genuinely to carry out the investigation or prosecution,”<sup>261</sup> that is no longer the situation and the ICC can reconsider its decision on admissibility and pursue an alternative approach that would better serve the ends of justice.

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258. See Abbas, *supra* note 216, at 25. In fact, even though the Rome Statute does not permit the imposition of the death penalty, Uganda would not necessarily have to repeal its death penalty provision because the ICCPR recognizes that it should be limited to the “most serious crimes.” Compare Rome Statute, *supra* note 14, art. 77 (1) (limiting sentencing to a term of years, not to exceed a maximum of 30, or “a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”), with the ICCPR, *supra* note 8, art. 6(2).

259. Rome Statute, *supra* note 14, art. 53(4).

260. See, e.g., Rep. of the ICC, *supra* note 245.

261. Rome Statute, *supra* note 14, art. 17(1).

*C. Alternative International Approaches in Constituting an ICC Proceeding*

The ICTR, constituted by the UN Security Council under its Chapter VII enforcement authority (threats to peace), and the SCSL, created by a bilateral international agreement between the United Nations and the Government of Sierra Leone (“GoSL”), offer two different models for the creation of a hybrid international tribunal. Each approach has its merits, depending upon the willingness of the host nation to support the investigation and prosecution of a case, the capacity of the host nation’s judicial institutions, available funding, and the need to provide accountability under both international humanitarian and domestic law. Each approach also has its advantages as compared to prosecution by the ICC. On one hand, the ICC, as it sits at the Hague, can contribute to the development of a coherent body of international criminal law, and move the international community away from earlier ad hoc tribunals. On the other hand, the ICC—at least as applied to the Uganda-LRA conflict—can leave an impunity gap with the defendants not held accountable for some offenses. The existence of such a gap can bring about a loss of legitimacy and cannot contribute to developing national state capacity. All said, a mixed tribunal under ICC leadership, as suggested by the Sierra Leone experience, offers the ICC and Uganda a viable means of achieving justice through enhanced accountability.

The 1994 genocide had a devastating impact on Rwanda. It has been estimated that over 800,000 people, largely Tutsi in ethnicity, were killed in a hundred-day spree of popular rampage, all in a country that had a pre-genocide population of an estimated seven to eight million.<sup>262</sup> This genocide was planned and executed by government leaders, with participation at all levels of society, often with neighbor killing, mutilating, raping, and/or robbing neighbor.<sup>263</sup> This genocide also eviscerated the Rwandan justice system, leaving

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262. Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N. U. L. REV. 41, 42-43 (2005) (reviewing the history of the genocide and explaining how post-genocide trials occurred at three different levels).

263. Hollie Nyseth Brehm et al., *Genocide, Justice, and Rwanda’s Gacaca Courts*, 30(3) J. CONTEMP. CRIM. JUST. 333, 334 (2014). See also PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA’S GENOCIDE, ITS COURTS AND THE UN CRIMINAL TRIBUNAL 19-22 (2000).

the new government led by Paul Kagame's Rwandan Patriotic Army ("RPA," later renamed the Rwandan Defense Forces) with overwhelming problems in searching for, incarcerating and imprisoning an estimated one million perpetrators.<sup>264</sup> This situation led the new Rwandan government to request international assistance in the form of a tribunal to try the persons most culpable for the genocide, and to initiate national trials for the next most culpable group and the local *Gacaca* courts for the bulk of the participants.<sup>265</sup>

The ICTR was established by the UN Security Council under its Chapter VII authority of the UN Charter based upon a request from the Government of Rwanda.<sup>266</sup> The UN Security Council created this tribunal with subject matter jurisdiction for "serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994."<sup>267</sup> The Statute then proceeds to define three crimes that would be before the court: genocide, crimes against humanity, and violations of Common Article 3 and of Additional Protocol II.<sup>268</sup> The Statute also provides for concurrent jurisdiction between the ICTR and Rwandan national courts, with the ICTR having primacy over national courts.<sup>269</sup> While the Statute does not exclude Rwandan judges, it provides that judges shall be elected by the General Assembly from a list provided by the Security Council.<sup>270</sup> Clearly, this court was created with limited subject matter, personal, and temporal jurisdiction focused on the most culpable perpetrators while allowing Rwanda to prosecute a larger class of defendants. The ICTR

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264. See Brehm, *supra* note 263, at 334-35.

265. See Drumbl, *supra* note 262, at 44-48.

266. S.C. Res. 955 (Nov. 1994).

267. *Id.* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE COMMISSIONER, STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA, art. 1, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx> [hereinafter International Tribunal Statute]. Some Rwandans have criticized the limited temporal jurisdiction, arguing that the ICTR should have examined a broader span of time to include the period 1990-94. See also Drumbl, *supra* note 262, at 46, n.22; Nigel Eltringham, *A Legacy Deferred?: The International Criminal Tribunal for Rwanda at 20 Years*, *E-International Relations* (Apr. 29, 2014), <http://www.e-ir.info/2014/04/29/a-legacy-deferred-the-international-criminal-tribunal-for-rwanda-at-20-years/>.

268. International Tribunal Statute, *supra* note 267, at arts. 2-4.

269. *Id.* art. 8.

270. *Id.* art.12(3).



has achieved commendable results with annual reporting on its progress<sup>271</sup> and has recently reported that it anticipates closing its doors by the end of 2015.<sup>272</sup>

While there are merits to the approach taken by the UN Security Council, especially in providing outside expertise and resources, this approach has also caused some level of discord and alienation between Rwanda and the ICTR.<sup>273</sup> The UN approach has excluded Rwandans from the bench and court staff, and its distance between Rwanda and Arusha has made it difficult for many Rwandans to attend or even follow the proceedings.<sup>274</sup> The Rwandan government has dissented from the ICTR's inability to impose the death penalty on the most culpable persons, while it has imposed capital punishment in its national level trials, and has also opposed any suggestion that the ICTR might prosecute members of the RPA for any abuses that may have occurred in ousting the former regime.<sup>275</sup> Unlike the ICTR, there is some evidence that the *Gacaca* courts, "which primarily operate at the local level, may inherit greater legitimacy among local audiences than national or international courts."<sup>276</sup> This is no doubt true because local people have an opportunity to see and participate in proceedings that concern them, their friends, and their neighbors. Victims and their families can learn about what happened and see some level of justice exacted, whether it is in the form of prison terms, community service, or reparations.<sup>277</sup>

Sierra Leone experienced a devastating civil war that lasted from March 1991 to January 2002 which started when Charles Taylor sent his forces into Sierra Leone from neighboring Liberia.<sup>278</sup> This civil war was waged by several organized armed groups that committed serious breaches of international humanitarian law to include the use of child soldiers, enslavement of women as sex slaves, terror tactics

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271. Rep. of the Int'l Criminal Tribunal for Rwanda, U.N. Doc. A/69/206-S/2014/546 (Aug. 1, 2014).

272. Rep. of the Int'l Criminal Tribunal for Rwanda, *Report on the Completion Strategy of the Int'l Criminal Tribunal for Rwanda*, U.N. Doc. S/2015/340 (May 15, 2015).

273. See Drumbl, *supra* note 262, at 45-48.

274. *Id.* at 47.

275. *Id.* at 46.

276. *Id.* at 55.

277. *Id.* at 52-61.

278. Stephen J. Rapp, *The Compact Mode in International Criminal Justice: The Special Court for Sierra Leone*, 57 *DRAKE L. REV.* 11, 13-15 (2008).

that involved chopping off the hands and arms of civilians, rape, murder, and the exploitation of blood diamonds (pillage).<sup>279</sup> The victims were men and women, infants, children and adults, largely civilians of all ages. In fact, the rebel groups often targeted civilians rather than military or government personnel.<sup>280</sup>

Initially, in June of 2000, Sierra Leone President Alhaji Ahmad Tejan Kabbah wrote UN Secretary General Kofi Annan requesting international assistance in setting up a special court for his country.<sup>281</sup> President Kabbah called for a strong court that could address human rights violations that had occurred over a ten-year period, noting his government's experience in negotiating with the rebels over the failed Lome peace process,<sup>282</sup> and the fact that Sierra Leone had a decimated legal infrastructure and lacked the resources to dispense credible justice.<sup>283</sup>

Eventually, the SCSL was created by an agreement between the United Nations and the GoSL.<sup>284</sup> While the UN Security Council declined to create a court under its Chapter VII authority, it did direct the Secretary General to "negotiate an agreement with the Government of Sierra Leone to create an independent special court."<sup>285</sup> The UN Security Council recommended that the subject matter jurisdiction of the special court should include "crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean

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279. *Id.* at 14-17.

280. *Id.* at 14.

281. Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?* 32 MICH. J. INT'L L. 395, 398-99 (2011).

282. In July 1999, the Government of Sierra Leone and the rebels reached a peace agreement that was quickly dishonored by the rebels. *See* Rapp, *supra* note 278, at 19. This raises a question of whether the rebel leaders committed an act of perfidy under customary international law. *See also* Int'l Comm. of the Red Cross, *Customary International Humanitarian Law*, *supra* note 25.

283. *See* Rapp, *supra* note 278, at 19.

284. Agreement Between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138; U.N. Doc. S/2002/246 (2002). The Statute provides creates a mixed court consisting of judges appointed by both the GoSL and the Secretary General, provides for a prosecutor appointed by the Secretary General and a deputy appointed by the GoSL, provides for concurrent jurisdiction over serious violations of international humanitarian and Sierra Leonean law, addresses cases involving child combatants and amnesties, outlines the rights of the accused, and limits penalties to a term of imprisonment.

285. S.C. Res. 1315 (Aug. 14, 2000).

law committed within the territory of Sierra Leone,” and that the “special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes.”<sup>286</sup> It is also noteworthy that the SCSL had temporal jurisdictions for crimes committed after November 30, 1996, even though the civil war had started in March 1991. While there were apparently important political and legal considerations involving the court’s jurisdictional reach, this choice created a substantial “impunity gap.”<sup>287</sup> Ultimately, the SCSL conducted three main trials in Sierra Leone with the fourth, involving Charles Taylor, held at the Hague.<sup>288</sup> One interesting problem faced by the tribunal involved the July 1999 Lomé amnesty agreement and the claim that it would be an abuse of discretion for the SCSL to try persons for crimes covered under that agreement.<sup>289</sup> Here, the SCSL addressed that problem by concluding that,

[The] prosecution of the accused by an independent autonomous court, initiated by an independent prosecutor and not brought in the name of Sierra Leone, is not tainted by whatever undertaking any accused claiming the benefit of the amnesty may have believed he had from the Government of Sierra Leone.<sup>290</sup>

There were some important differences between the Chapter VII-based ICTR and the treaty-based SCSL.<sup>291</sup> First, as a Chapter VII court, the ICTR was able to benefit from funding collected by the

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286. *Id.*

287. Abdul Tejan-Cole, *The Special Court for Sierra Leone*, 1 AFR. HUM. RTS. L.J. 107, 115-16 (2001).

288. See Jalloh, *supra* note 281, at 404-12. Jalloh explains that, even though the Charles Taylor case had to be conducted at The Hague because of security concerns, locating the SCSL in Freetown had numerous advantages. He argues that as “the first modern ad hoc tribunal to be located *in situ*—the place where the atrocities occurred—it not only offered victims, witnesses and the general populace better access to justice, but also created the potential for them to contribute more visibly, more cheaply, and more efficiently to the proceedings before the Court.” *Id.* at 454. See also Nathaniel H. Babb, *Don’t Forget the Far East: A Modern Lesson from the Chinese Prosecution of Japanese War Criminals after World War II*, 222 MIL. L. REV. 129, 141 (2014) (stating that “hybrid courts are arguably better suited to meet the needs of countries emerging from conflict and are less likely to be removed from the circumstances where the crimes occurred”).

289. Prosecutor v. Morris Kallon (2004) Case No. SCSL-2004-15-AR72(E); Brima Bazzy Kamara (2004) Case No. SCSL-2004-16-AR72 (E) Decision on Challenge to Jurisdiction: Lomé Accord Amnesty.

290. See *id.* para. 90.

291. Stephen J. Rapp, *The Compact Model in International Criminal Justice: The Special Court for Sierra Leone*, 57 DRAKE L. REV. 11, 21-23 (2008).

United Nations and through the use of its authorities to mandate state (third party) cooperation on issues such as the arrest, detention, and transfer of accused persons.<sup>292</sup> Second, as a treaty-based court, the SCSL was able to avoid UN rules on procurement and personnel, but while having to cope with problems associated with soliciting financial support from outside donors.<sup>293</sup> Unlike the earlier ICTR that had been located in Arusha, Tanzania, about 500 miles from Kigali, the SCSL was based in Freetown so that it could readily hear from witnesses and make it possible for the Sierra Leonean people to following the proceedings. Indeed, some sixty percent of the court's employees were citizens of Sierra Leone.<sup>294</sup> In other words, a treaty-based court offers an opportunity for much more local "ownership" and public education about its efforts.

The Sierra Leone treaty-based, mixed tribunal would be a useful precedent for the ICC to create a similar tribunal—with broad subject matter, personal and temporal jurisdiction—for the entire scope and duration of the Uganda-LRA conflict.<sup>295</sup> In fact, the UN Security Council expressly provided for the broad subject matter jurisdiction:

. . . to help foster a sense of local ownership of the SCSL and its processes; to allow greater flexibility to the Prosecutor to pick and choose which of national and or international offenses to charge suspects with; and finally, to cast a wider net to ensure that the leaders responsible for the atrocities would not escape punishment.<sup>296</sup>

Like Sierra Leone, Uganda has experienced a prolonged period of civil war and instability in the north with widespread human rights abuses by the rebel groups involving child combatants and novel

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292. See *id.* at 26-28 (relating problems associated with the arrest of Charles Taylor). See also Magnarella, *Justice in Africa*, *supra* note 263, at 43.

293. See Rapp, *supra* note 291, at 21-22.

294. *Id.* at 34.

295. The Rome Statute allows the Court to provide a range of assistance activities to national governments such as training activities and the use of observer missions. See Rome Statute, *supra* note 14, art. 93. While there is a risk that the Court could become too closely involved with a host nation, making it more difficult for the Court to later criticize the proceedings as non-genuine, there are also great opportunities for partnership and increased dialogue that could increase host nation legal capacity. INTERNATIONAL CRIMINAL COURT, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE (2003), <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>.

296. See Jalloh, *supra* note 281, at 403.

gender crimes. In addition, some people believed that an international court with strong participation from Sierra Leone would be a useful means of excluding the use of the death penalty under national law.<sup>297</sup>

Unlike Sierra Leone, Uganda has a strong body of constitutional, statutory, and decisional law, with a capable and functioning judiciary—albeit one that has some important shortcomings. Indeed, unlike the Sierra Leonean judiciary that had been heavily impacted by the ravages of the civil war, Uganda has a capable judiciary with some experience in international criminal law; Uganda could greatly benefit from “capacity building” on the part of the ICC, at least in a qualitative sense.<sup>298</sup> Here, the ICC could help ensure that the defendants have fair trial rights, something that has been lacking in some Ugandan criminal trials (e.g., the role of the Ugandan Police and/or JATT in investigating cases and detaining and interrogating suspects, the possible selective prosecution of Thomas Kwoyelo,<sup>299</sup> or the multiple military and civilian proceedings against Colonel Kizza Besigye). In short, a mixed tribunal under ICC leadership could be an effective forum that delivers robust justice with enhanced legitimacy and strengthens local institutions.

#### *D. A Recommended Way Forward: Closing an Impunity Gap*

There are important political and legal advantages to the use of a hybrid approach that combines the efforts of the ICC and Uganda’s courts. First, and probably most important, prosecutions through a hybrid court involving the ICC and the Ugandan courts would serve the object and purpose of the Rome Statute itself. A hybrid court would help end the impunity for the perpetrators of serious crimes

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297. *Id.* at 401.

298. CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87, Chapter VIII (outlining the structures, functions, and authorities of an independent judiciary). Article 129 permits Parliament to establish subordinate courts with appellate rights to the High Court and to the Court of Appeals. In other words, the ICD is a creature of Parliament—not the Constitution itself—and Parliament could alter the “structures, procedures and functions” of that court (a division of the High Court) under Article 150. A bilateral agreement between the ICC and Uganda could, therefore, result in mixed tribunal that has both ICC and Ugandan trial judges, or it could result in a pure Ugandan bench with official observers from the ICC.

299. Nouwen, *supra* note 145 (stating that “[t]o date the prosecution of Kwoyelo appears to be a one-off case, prompted by opportunism rather than law,” and his prosecution served a political move in anticipation of the 2010 ICC Review Conference that was conducted in Kampala).

and contribute to the prevention of such crimes through effective national prosecutions.<sup>300</sup> The ICC would be positioned to support and mentor the Ugandan judges, both through its staff and judges in an observer status, contributing to enhanced Ugandan legal capacity. Second, the ICC likely has the authority under the Rome Statute, Article 93, to affect such an international agreement without recourse to the Assembly of States Parties and the time consuming statutory amendment process under Article 7(1).<sup>301</sup> Third, a hybrid court could validate the quality of the investigative and pre-trial work that already been completed by ICC. The court could make public and use its investigative work, especially as it involves crimes committed by members of the UPDF against either the civilian population or LRA members, in criminal proceedings. This would help people—both in northern Uganda and the international community—see that a fair and balanced process is taking place, enhancing the credibility of the tribunal.<sup>302</sup> Fourth, the tribunal could contribute to the significant and positive changes in Uganda’s administration of justice over the past ten years. Here, the presence of ICC judges, investigators and staff would add credibility to the Ugandan proceedings and help the Ugandan judiciary work through some difficult and contentious material. Finally, this approach would actually incentivize other States that make early referrals to the ICC, knowing that if they too had occasion to request withdraw a referral based upon a change of circumstances that they might actually reap political and legal benefits in making a stand against impunity.

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300. Rome Statute, *supra* note 14, pmb1.

301. *Id.* art. 93 (allowing the Court to provide a range of assistance activities to State parties).

302. Nouwen, *supra* note 145, at 23. Some have questioned the ICC’s failure to open an investigation into the conduct of the UPDF. While some could argue that the LRA’s offenses were graver than any committed by UPDF soldiers or that there is a lack of evidence, others suggest that the explanation “can be found in its dependence on cooperation of the Ugandan government for its case against the LRA—had the [Office of the Prosecutor] antagonised the Ugandan government by investigating and prosecuting its members or subordinates, chances would have been slim that Uganda would cooperate in the ICC’s case against the LRA in the way it has.” *Id.* See also Anne Mugisa & Hillary Nsambu, *ICC clears UPDF in the north*, NEW VISION (Kampala) (Aug. 30, 2008), [http://www.newvision.co.ug/new\\_vision/news/1182172/icc-clears-updf-north](http://www.newvision.co.ug/new_vision/news/1182172/icc-clears-updf-north) (explaining that the ICC has not found sufficient evidence against the UPDF to warrant indictments against any of its officers).

There has been notable antagonism between many African leaders over the past ten years and the ICC.<sup>303</sup> Some African heads of state believe that there has been an excessive emphasis on African cases, while other leaders—particularly leaders in the political opposition parties—believe that President Museveni and some of his senior officers should be prosecuted for crimes that they themselves have committed over the course of the same conflicts. President Museveni, while speaking at the UN General Assembly in September 2013, spoke of “African anger” in that its positions on African issues had been ignored.<sup>304</sup> In short, an ICC initiative that uses a bilateral approach, combining the work of the court and the Ugandan judiciary, could help alleviate some of the accumulated antagonism between the court and African leaders. A joint proceeding, especially one based in East Africa, could provide increased transparency and legitimacy to its proceedings. This is an initiative that the ICC should support; it could help the court maintain its long-term relationships with many African nations. Also, this is an initiative that Uganda should support, as it could give Uganda increased voice in the court’s proceedings while enhancing its own national capacity.

A bilateral ICC-Uganda agreement should address the following issues:

- It should require that all LRA criminal offenses be heard by the ICD, supported by ICC staff and with ICC trial judges in an observer status (i.e., a mentoring role)

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303. See, e.g., Frederic Musisi & Nelson Wesonga, *Is Museveni attack on ICC for Pan-Africanism or personal reasons?*, DAILY MONITOR (Kampala) (Dec. 17, 2014), <http://www.monitor.co.ug/artsculture/Reviews/Is-Museveni-attack-on-ICC-for-Pan-Africanism-or-personal/-/691232/2559688/-/ju1ffu/-/index.html>. Indeed, President Museveni had earlier attacked the ICC at the 2013 inauguration of Kenya’s President Uhuru Muigai Kenyatta. According to press, “Ugandan President Yoweri Museveni told the gathering of dozens of African leaders and tens of thousands of Kenyans on Tuesday that he saluted Kenyan voters for rejecting “the blackmail” of the ICC by electing as president Kenyatta, who is scheduled to stand trial at the court in July. Museveni claimed unnamed states have sought to abuse the ICC for their own agenda.” See also Tom Maliti, *Ugandan President attacks ICC during Kenyatta inauguration*, INT’L JUSTICE MONITOR (Apr. 9, 2013), <http://www.ijmonitor.org/2013/04/ugandan-president-attacks-icc-during-kenyatta-inauguration/>. See also AFRICA AND THE INTERNATIONAL CRIMINAL COURT (Werle, et. al. eds., 2014) (providing the most comprehensive treatment of this important topic with a range of useful contributions by leading experts in the field of international criminal justice).

304. *Museveni Attacks ICC at UN Summit in New York*, INSIDER (Kampala) (Sept. 25, 2013), <http://www.theinsider.ug/museveni-attacks-icc-at-un-summit-in-new-york/>.

- It should require that all UPDF criminal offenses be heard by a general court martial, also supported by ICC staff and with ICC trial judges in an observer status (i.e., a mentoring role)
- The combined tribunals should be based in the ICTY court spaces in Arusha, Tanzania with court security provided by the ICC or a named third party
- All appellate issues should be addressed through the Ugandan appellate processes, with ICC judges in an observer status for any such proceedings
- It should address all criminal offenses committed in violation of the Ugandan Penal Code, the UPDF Act (such as arms and uniform violations by LRA members or war crimes by the UPDF), or IHL over the course of the Uganda-LRA conflict from January 1, 1990, to the present and continuing
- It should apply the extra-territoriality (universal jurisdiction) provisions of Ugandan law as it applies to any crimes committed in southern Sudan, the DRC, or the CAR
- It should address all crimes committed by the named LRA defendants presently under indictment by the ICC,<sup>305</sup> as well as any other named senior officers of the LRA or the UPDF, as identified by the ICC
- It should use the evidence, to include witnesses and documents, provided by the ICC
- It should exclude the application of Uganda Amnesty Law
- It should exclude the application of the death penalty under Ugandan law, with the sentencing limited to a term of years or life imprisonment, as provided for under Article 77 of the Rome Statute
- It should not recognize any defense of immunity
- It should provide for the costs of witness travel and protection

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305. The ICC would not necessarily have to rescind the existing indictments; the ICC could simply deputize the combined tribunal to hear the matter as if it were the ICC, thus preserving the integrity of the original indictments while bolstering the new tribunal.



- Its proceedings should be open to members of the press

There are also four important practical issues that must be considered with this tribunal. Initially, Uganda will likely have to amend both the 2005 UPDF Act and the 2010 ICC Act to ensure that the agreement has parliamentary approval and to avoid any unnecessary complications under Ugandan law. In one example, the commitment to prosecute named individuals could be considered inconsistent with the DPP's prosecutorial discretion.<sup>306</sup> In a second example, the presence of ICC observers, staffing, and support could be construed as impairing the independence of the Ugandan judiciary.<sup>307</sup> Thus, parliamentary approval would facilitate clear working relationships between ICC and Ugandan officials.

Second, the tribunal should use the evidence accumulated from the ICC's investigation of the cases over the past ten years. The ICC has performed commendable work in investigating the conflict, at least from the start of its jurisdiction in July of 2002. The ICC's investigators, as well as the body of reliable evidence that it has amassed, have considerable credibility over the Ugandan Police, JATT, and other domestic law enforcement organizations. This should help ensure a fair trial for the defendants untainted by any claims about incompetent, corrupt, or abusive Ugandan law enforcement practices that have previously raised alarms in the international community. This should also reassure skeptical audiences that any offenses committed by the UPDF are not simply whitewashed over.

Third, there should be cost-sharing between the ICC and the Ugandan government. Based upon the experiences of earlier international criminal tribunals, it could take the ICC-Uganda tribunal two to five years to try each case. Still, with support from the ICC judges and staff, Uganda should be able to prosecute the cases much faster than it would otherwise if left to its own devices. Thus, ICC funding could be used to hire and train additional court staff, provide

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306. The Constitution of the Republic of Uganda provides that: "In the exercise of the functions conferred on him or her by this article, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority. CONSTITUTION OF THE REPUBLIC OF UGANDA, *supra* note 87, art. 120(6).

307. *Id.* art. 128 (stating "(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority. (2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions").

for improved record-keeping and evidence tracking systems, and ensure witness availability and protection.

Fourth, this hybrid tribunal should be located in the ICTY court in Arusha, Tanzania. Thus, the court would be based in the region and help draw African support. It would give the hybrid court ready access to witnesses and evidence, while at the same time allowing ready access to observers to its proceedings. While there would be some advantage to Kampala-based proceedings, to include ease of access to Ugandan victims and witnesses, the use of ICTY facilities would provide for better court security and give the court more control over its own proceedings while avoiding any corruption or outside political interference. Indeed, as Naluwairo indicated, Uganda lacks “alternative special or high-security civilian courts.”<sup>308</sup> In short, an Arusha-based tribunal would be more focused on the issues at hand, as opposed to one based in Kampala and open to outside pressures, and more accessible to African observers and witnesses, as opposed to one based at the Hague and less accessible to interested parties.

This approach would provide the ICC with an opportunity to support national prosecutions under international standards for a fair trial. While the ICC-Uganda tribunal might only prosecute a limited number of persons, it could enhance Uganda’s capacity to handle complex criminal cases and ensure a fair trial through effective international oversight.

## VI. CONCLUDING COMMENTS

The Uganda-LRA conflict is best characterized as a non-international armed conflict between an “organized armed group” and the GoU, at least until December of 2008—after which time the UPDF has been conducting counter-terrorism operations against a

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308. Naluwairo, *supra* note 103, at 179-80. It is also noteworthy that Uganda’s lead prosecutor for the high-profile trial of the thirteen terrorists accused of taking part in the July 2010 bombing of the Ethiopian Village Restaurant was murdered in Kampala. *See also* AFP, *Uganda Attacks Trial Resumes after Murder of Prosecutor*, DAILY MAIL (Kampala) (June 8, 2015), <http://www.dailymail.co.uk/wires/afp/article-3115391/Uganda-attacks-trial-resumes-murder-prosecutor.html>. One would expect that a joint ICC-Uganda trial involving high profile defendants from the LRA and the government could generate even greater security requirements. *See, for example*, the treatment meted out against Dr. Besigye and his co-defendants in the November 2005 and March 2007 court sieges. *Besigye & Others v. Attorney General*, *supra* note 186.

criminal organization. This unique group, while it has origins as a rebel/insurgent organization, has committed a wide-ranging terror campaign over the past twenty years that has resulted in the death or mutilation of perhaps 100,000 civilians, in the kidnapping of tens of thousands of children for use as soldiers or sex slaves, in the theft or destruction of civilian property, and in the displacement of millions from their homes. While there have been a limited number of claims regarding offenses committed by the UPDF, these claims involve events that occurred largely in the 1990s. Uganda has an obligation to bring all culpable persons, either LRA or UPDF, to account for the full range of offenses under both international and national law.

Despite the broad coverage provided by Uganda criminal law, there are significant drawbacks to its use against unprivileged belligerents.<sup>309</sup> First, Uganda's courts lack the experience trying cases involving war crimes and many ethnic groups in Uganda, especially the Acholi, do not trust Museveni's government. Uganda's limited experience with war crimes cases would only be compounded by the complexity of international law issues. Second, the LRA depredations have occurred over a protracted period encompassing parts of four countries, each country having varying obligations under international law. This means that while Uganda may have considerable evidence against the LRA and its members for offenses committed in Uganda, it will have difficulty gathering some evidence and foreign witnesses for trials in Ugandan courts based on offenses committed in either the DRC or the CAR. Third, there is some complexity in the international norms regarding war crimes, as well as the appropriate punishments thereto (e.g., the death penalty), committed by children.

This conflict calls for justice and accountability measures which would be best administered through an impartial, international tribunal with the broad ranging expertise and resources that could provide closure to the victims while promoting international peace and security in a war-torn region. A Ugandan tribunal, with direct assistance by ICC judges and staff, could serve to legitimize the role, functions and work of the ICC to date, enhance the capacity of Uganda legal institutions, and enhance the prospects for peace and accountability throughout the Great Lakes Region.

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309. Isaac Mufumba, *ICC Bill: Why did MPs trap Museveni and save Kony?*, INDEPENDENT (Kampala) (Mar. 31, 2010), <http://www.independent.co.ug/column/in-sight/2702-icc-bill-why-did-mps-trap-museveni-and-save-kony>.